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Po-Cheng Chang, Beatrice H. Chang, and American Estate Management Corporation v. Soldier Summit Development, American City Corporation, Ming-Cheng Lin, Hsiun Mei Yen Lin : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

PO-CHENG CHANG, BEATRICE H. CHANG, and AMERICAN ESTATE MANAGEMENT CORPORATION, a Utah corporation, Plaintiffs-Appellants, vs. SOLDIER SUMMIT DEVELOPMENT, a Utah limited partnership, AMERICAN CITY CORPORATION, a Utah corporation, INTERNATIONAL INVESTMENT & DEVELOPMENT CORPORATION, a Utah corporation, MING-CHENG LIN, individually, and HSIUN MEI YEN LIN, individually, Defendants-Appellees.	:	Case No. 980234-CA Priority No. 15 RFU 50 .A10 DOCKET NO. 980234-CA

BRIEF OF APPELLEES

Appeal from Final Order of the Third District Court of Salt Lake County
State of Utah
Judge Glenn K. Iwasaki

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes and Rules

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to U.C.A. § 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED

1. Whether the district court properly ruled that defendants did not engage in "willful misconduct" by not marketing the Soldier Summit property in 1982-84.

Standard of Review: Correctness. *Blue Cross and Blue Shield v. State*, 779 P.2d 634, 636 (Utah 1989).

Record: This issue was raised in defendants' memorandum supporting summary judgment (R. 1462-68), and decided in favor of defendants (R. 2046-47).

2. Whether the district court properly granted summary judgment on plaintiffs' fraud claim for lack of proof of any detrimental reliance.

Standard of Review: Correctness under a clear and convincing burden of proof. *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1046-47 (Utah App. 1994).

Record: This issue was raised in defendants' memorandum supporting summary judgment (R. 1478-79), and decided in favor of defendants (R. 1904).

3. Whether plaintiffs' claims regarding non-sale of the Soldier Summit property are barred by statutes of limitation.

Standard of Review: Correctness. *Warren v. Provo City Corp.*, 838 P.2d 1125, 1128 (Utah 1992).

Record: This issue was raised in defendants' memorandum supporting summary judgment (R. 1468-77), but was not decided by the district court (R. 1905-06, 2046-48).

DETERMINATIVE LEGAL PROVISIONS

This case is governed by the terms of the limited partnership agreement, which is set out verbatim in the Addendum (hereafter "Add."). (Add. 14.) Also relevant are applicable statutes of limitation, U.C.A. §§ 78-12-23(2), -25(3), and -26(3), which are reproduced in the Addendum. (Add. 98-100.)

STATEMENT OF THE CASE

This is an action by limited partners in a real estate development alleging wrongful failure by the general partner to market the property between 1982 and 1984. The plaintiffs alleged multiple claims and theories for relief, and the defendants alleged various counterclaims. (R. 847, 886.) However, all of those claims and counterclaims have now been resolved except for plaintiffs' three claims on this appeal, all of which pertain to development and marketing of the property. (R. 2042-44, 2048; Brief of Appellants, hereafter "App. Br.," at 14.) In claims two, seven, and eight of the Second Amended Complaint, plaintiffs allege breach of fiduciary duty, breach of partnership agreement, and fraud in the general partner's so-called "failure" to market the property between 1982 and 1984. (R. 858-64; App. Br. 18.)

Defendants moved for summary judgment on the grounds that development and marketing of the property was entirely within the discretion of the general partner, that the partnership agreement limited general partner liability to "willful misconduct," and that non-sale of the property between 1982 and 1984 was based on business and economic factors, and did not constitute "willful misconduct." Defendants also

demonstrated that plaintiffs' claims are barred by statutes of limitation. (R. 1462-70, 1475-79.) The district court granted defendants' motion, ruling that the decision not to market the property did not amount to "willful misconduct," and that plaintiffs did not prove any injury in reliance on any misrepresentation by defendants. (R. 1903-04, 2046-47.) The district court did not decide the statute of limitations defense, rejecting plaintiffs' claims on other grounds. (R. 1905-06.) Plaintiffs appealed the order of summary judgment to the Utah Supreme Court, which transferred the case to this Court. (R. 2052.)

STATEMENT OF FACTS

The Chang plaintiffs and the Lin defendants have been involved in various business relationships since the early 1970's, when Mr. Lin, a resident of Taiwan, asked Mr. Chang, a Utah resident, to assist him in making and managing real estate investments in the United States. In 1974, Mr. Chang formed International Investment & Development Corporation ("IID") as a business entity to carry out these investments. The Lins and their children owned 80 percent of IID, while the Changs and their children owned 20 percent. Mr. Chang acted as president and conducted the affairs of IID. Thereafter, Mr. Chang formed other corporations as wholly-owned subsidiaries of IID to hold and manage specific assets of IID. Two of these subsidiaries were American Estate Management Corporation ("AEM") and American City (Development) Corporation ("ACC"). Mr. Chang was also the president and managed the affairs of these subsidiary corporations. (R. 898-900, 1359-60, 1453.)

In November 1978, the Soldier Summit Development limited partnership was formed ("Soldier Summit"). The purpose of the Soldier Summit partnership was to own, hold, develop, improve, sell, lease, dispose of, and otherwise deal with 4,000 acres of unimproved real estate located in Soldier Summit (Utah County and Wasatch County), Utah. The designated general partner was ACC, which contributed 90 percent of the capital; the sole limited partner was Jay Murphy, who contributed 10 percent of the capital. (R. 1482-83; Add. 14-16.) Paragraph 12.1 of the partnership agreement states that the general partner "shall have full, exclusive and complete discretion in the management and control of the Partnership . . . and shall make all decisions affecting the Partnership's affairs." (R. 1485; Add. 17.) Paragraph 12.4 of the agreement provides that "[t]he General Partner shall not be liable to the Partnership or the Limited Partners for errors in judgment or for any acts of omission . . . that do not constitute willful misconduct." (R. 1487; Add. 19.) Limited partners had no authority to participate in the management or business of the partnership. (R. 1484; Add. 16.) The partnership agreement did not specify any particular time or deadline for marketing of the property.

The relationship between the Changs and the Lins subsequently deteriorated due to conflict and distrust, resulting in a separation agreement between the parties in February 1982. (R. 1492; Add. 24.) Pursuant to this agreement, the Changs transferred their interest in IID, including the subsidiary ACC, to Lins. In return, the Changs received ownership of AEM and a limited partnership interest in Soldier Summit. The effect of these transfers was that ownership and control of ACC, the general partner of

Soldier Summit, was relinquished by the Changs and assumed exclusively by the Lins. (R. 1361, 1454; App. Br. 7.) In March 1982, the parties amended the Soldier Summit partnership agreement to reflect these changes, listing the Changs as additional limited partners, with a combined ownership interest of 9 percent, leaving ACC, the general partner, with an ownership interest of 81 percent. (R. 1498-99; Add. 30-31.) [1]

Following the transfer in control of ACC, the Lins proceeded with the planned Soldier Summit development. They hired Henry Yen (Mrs. Lin's brother) as president of ACC to manage day-to-day affairs of the development. ACC also hired Clark Lin (no relation to the Lin defendants), a civil engineer, to help obtain plat approval for two subdivisions of recreational lots in the development. (R. 1457, 1512, 1515.) As conditions of plat approval, the Town of Soldier Summit required conveyance of water rights to the town, approval from the State of Utah to segregate the water rights, an access easement across adjacent railroad tracks, access easements from adjoining landowners, engineering data for roads, a design for a water pick-up station, and vacation of a prior overlapping subdivision. By January 1984, ACC had obtained plat approval for the two subdivisions. (R. 1458, 1515-16.) [2]

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[1] Plaintiffs assert that, "[a]fter the change in management, the Lins determined to simply delay the development," and that Lins made a "change of plans" to market the property. (App. Br. 19.) However, plaintiffs cite no support for any such decision or plan, and in fact there was none. As shown below, defendants actively developed the property following the change in management of ACC, the general partner.

[2] The Changs claim that their "intent," while they managed ACC, was to sell the Soldier Summit property "as quickly as possible," and to sell 60 to 70 percent of the property between 1982 and 1983. (App. Br. 8-9.) However, that "intent" is nowhere stated in, or required by, the partnership agreement, which neither requires that the property be sold at all, nor specifies any certain timetable for sale or other action. Moreover, marketing of the property during that time was not possible because the infrastructure improvements, such as roads and waterworks, had not yet been completed. (R. 1821-25; Add. 35-39.)

Following preliminary approval of two plats, the development still faced significant obstacles, both governmental and economic. In April 1984, the State of Utah dissolved the Town of Soldier Summit. The Soldier Summit development was thereafter subject to the jurisdiction of Utah County, which imposed substantially more strict and difficult conditions for subdivision approval. In addition, the project had to be registered with the federal Department of Housing and Urban Development ("HUD") in order to permit interstate sales of the lots. The initial HUD registration was rejected and had to be revised and resubmitted. (R. 1458, 1505, 1516.)[3]

In March 1985, ACC issued a general business plan to establish short- and long-term goals for the Soldier Summit development. The plan envisioned a year-round "premier recreation property . . . to produce the maximum amount of profit with the available land resources." (R. 1821; Add. 36.) Necessary tasks for 1985 included construction of roads and a water pick-up station, as well as county approval of the master plan. (R.1823; Add. 38.) The business plan projected sales of 15 lots in the approved subdivisions. (R. 1822; Add. 37.) However, prior to marketing the lots, the plan called for a re-evaluation to ensure maximization of profits:

Neither were economic conditions conducive to sale of the lots in 1982-83, as Changs themselves discovered in trying to market IID's Logan, Utah property. (*See infra*, n. 6.) In any event, defendants were not obligated to carry out the Changs' intent after management of ACC passed to the Lins in 1982. Rather, the Lins, as owners and managers of ACC, the general partner, assumed complete discretion to manage the Soldier Summit property according to their *own* best judgment.

[3] Plaintiffs note that defendants planned to have the Soldier Summit property on the market in 1984, which is true. (App. Br. 9.) However, that projection was made *before* the various governmental obstacles arose, and before the results of independent marketing studies were received. In any event, the plan was couched in conditional terms of, "if all goes well" (R. 1810), but all did not go well.

> [W]e need to re-evaluate whether the currently approved Plats C and D is the best way to go. . . . [I]t is advisable to look into other possibilities at this early stage of the development before we proceed to complete Plats C and D. . . . We may not have made the best use of the land resources under Plat C/D subdivision. [R. 1821; Add. 36.]

Pursuant to this need for re-evaluation, ACC retained a real estate marketing expert, Thomas Kasper, to conduct a marketing study and determine the economic feasibility of the Soldier Summit development. In January 1986, Kasper issued his written report, analyzing the nature of the property, the market for such recreational lots, current economic conditions, the performance of competing or comparable prior projects, marketing strategies, and anticipated sales. (R. 1459, 1519; Add. 40.) Noting that "the recreational land boom lost much of its success in the 1979-82 era of economic adjustment" (Add. 46), Kasper concluded: "Market demand is at a low ebb for recreational type property and any development should be undertaken with caution and a long term commitment." (Add. 49.) In fact, "[t]he master development of all 4500 acres will, if developed, take a number of years to accomplish." (Add. 64.) The report's executive summary concludes that "there is a substantial amount of risk in the development of any recreational land," and that risk is accentuated by "*the lack of demand for recreational land at this time.*" (Add. 42, emp. added.) Regarding the anticipated rate of sales, the report summary concludes that "absorption for this development will not be quick. Recreational land is no longer fueled by the speculation

buyer, therefore *a rapid sellout is not reasonable to expect.* In the best case scenario 20-30 lots per year will be sold in the 88 lot phase of development." (*Id.*, emp. added.) [4]

After receiving the Kasper report, ACC placed test ads for the lots in local newspapers to verify the accuracy of the report's conclusions. Not a single response was received. Based on the Kasper report and negative results of test marketing, ACC decided not to market the lots at that time and to postpone further infrastructure improvements until the market for recreational lots improved sufficiently to justify the cost. In the meantime, ACC continued to work on perfection of water rights, to explore ways of reducing development costs, to meet with government agencies, and to monitor market conditions. In order to generate some income while waiting for market improvement, ACC leased the property for seasonal hunting and sheep grazing. (R. 1459-60, 1517-18.)

In 1995, ACC received an offer to purchase the Soldier Summit property for $2 million as part of a larger recreational development near Scofield Reservoir. ACC retained a different marketing expert, Robert Wietzke, to determine the economic feasibility of developing the Soldier Summit property in recreational lots, as compared to the proposed sale of the entire property to a larger developer. The Wietzke report found that the cost and revenue projections made in 1986 were still valid, and that development

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[4] Plaintiffs refer to the ACC 1985 business plan for Soldier Summit as "projecting" certain sales and revenues. (App. Br. 10.) However, those numbers were not guarantees, but were presented as short- and long-term "goals." (R. 1821-22; Add. 36-37.) In any event, those goals were set *prior to*, and without the benefit of the independent Kasper marketing study. In light of the Kasper report, the entire concept of the Soldier Summit development had to be reassessed.

would result in a negative cash flow of $1,677,400 over four years. (R. 1460, 1552-54; Add. 73-75.) The report concluded that "*it would not be economically feasible to develop the subdivision because it results in a substantial net loss.*" (R. 1554; Add. 75, emp. added.) Based on this conclusion, the report recommends sale of the property as a whole for inclusion in a larger development. (*Id.*) Such a sale is presently under consideration.

Plaintiffs commenced this action in September of 1990, alleging various claims and theories for relief regarding several business enterprises of the parties. (R. 1.) After extended discovery, amendments of pleadings, and various motions, rulings and stipulations, the issues have now been narrowed to those surrounding development of Soldier Summit. Plaintiffs, as limited partners, alleged that defendants, as general partner, wrongfully failed to market Soldier Summit in 1982-84, and that plaintiffs are entitled to damages under theories of breach of fiduciary duty, breach of partnership agreement, and fraud. (Second Amended and Supplemental Complaint, Second, Seventh, and Eighth Claims, R. 847.) Defendants moved for summary judgment on these claims on the basis that, under the terms of the partnership agreement, the general partner has absolute discretion in dealing with the property; the general partner can be liable only for "willful misconduct;" and the general partner's decision not to market the property in 1982-84 did not constitute "willful misconduct." Defendants also demonstrated the absence of fraud or detrimental reliance, and that all the claims were barred by statutes of limitation. (R. 1452-70, 1475-80.) The district court granted

summary judgment on the basis that the general partner's decision was not "willful misconduct," and there was no proof of detrimental reliance. The court did not decide the statute of limitations issue. (Mem. Decision, R. 1901, 1903-06; Add. 8, 10-13; Final Order, R. 2042, 2046-48; Add. 1, 5-7.) Plaintiffs appeal that order. (R. 2052.)

SUMMARY OF ARGUMENT

The district court properly granted summary judgment on the breach of fiduciary duty and contract claims because the general partner's non-sale of the property between 1982 and 1984 was not "willful misconduct." Under the terms of the limited partnership agreement, the general partner has "exclusive and complete discretion" in the management of the Soldier Summit property and has "full power and authority . . . to take any action" deemed necessary in relation to the property. Moreover, by the express terms of the partnership agreement, the general partner "shall not be liable to . . . the Limited Partners . . . for any acts of omission . . . that do not constitute willful misconduct." "Willful misconduct" is defined in the case law as a wrongful act undertaken with knowledge that it will cause injury to another. An authorized business decision that is within the discretion of a general partner does not constitute "willful misconduct," even if the decision manifests error in judgment.

The general partner's non-sale of the property between 1982 and 1984 was an authorized business decision based on the status of the property and economic conditions. The issue here is not whether the general partner willfully failed to market the property, but whether non-sale of the property is "willful misconduct." Because the

decision to sell, and timing of sales, was discretionary with the general partner, there was no "misconduct" at all. Neither did the general partner's conduct result in any actual injury to plaintiffs. Plaintiffs have presented no evidence of loss, and no such loss can possibly be determined until the property is actually sold. Because plaintiffs have incurred no definable loss, their claims are not ripe for adjudication.

The district court properly granted summary judgment on the fraud claim because plaintiffs have presented no clear and convincing evidence that defendants did not intend to develop and market the property according to their stated plans. Moreover, plaintiffs expressly denied any action or inaction in reliance on statements by defendants. In any event, plaintiffs have identified no actual injury which they incurred in reliance on any statement by defendants.

Finally, plaintiffs' claims are barred by statutes of limitation. The central allegation of plaintiffs' case, common to all three legal theories, is that defendants wrongfully failed to market the Soldier Summit property between 1982 and 1984. Plaintiffs admit that they knew, at least by the end of that time period, that the property was not marketed during that time period. Therefore, plaintiffs' fiduciary and contract claims, filed in September 1990, are barred by the four- and six-year statutes of limitation, respectively. The fraud claim is barred by the three-year statute of limitations, which began to run on discovery of the supposed fraud in 1985.

ARGUMENT

Plaintiffs' statement of the standard of review is incomplete, and their application of the standard is inaccurate. (App. Br. 12-14.) Contrary to plaintiffs' characterization, the district court did *not* weigh the evidence and make findings of fact. Rather, the court granted judgment to defendants as a matter of law because plaintiffs failed to set forth specific facts from which a reasonable jury could conclude that defendants engaged in "willful misconduct." (Add. 5-6, 10-11.)

Summary judgment is appropriate when there is no genuine dispute as to any material fact, or where, "even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law." *Hunt v. ESI Engineering, Inc.*, 808 P.2d 1137, 1139 (Utah App. 1991). *See also Briggs v. Holcomb*, 740 P.2d 281, 283 (Utah App. 1987). Even a question of fact may be decided as a matter of law if a reasonable jury could reach only one conclusion. *E.g., Robertson v. Utah Fuel Co.*, 889 P.2d 1382, 1384 (Utah App. 1995); *Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 450 (Utah App. 1994) (summary judgment proper when reasonable minds could not differ on the result). In such cases, summary judgment serves the salutary purpose of eliminating the time and expense of an unnecessary trial. *E.g., Reagan Outdoor Advertising, Inc. v. Lundgren*, 692 P.2d 776, 779 (Utah 1984). To avoid summary judgment, the opposing party "may not rest upon the mere allegations . . . of his pleading, but his response . . . *must set forth specific facts showing that there is a genuine issue for trial.* If he does not so respond, summary

judgment, if appropriate, shall be entered against him." Rule 56(e), Utah R. Civ. P. (emp. added). *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986) (summary judgment required where nonmoving party fails to prove essential element of its case).

Here, plaintiffs failed to set forth specific facts showing that defendants engaged in "willful misconduct," or that plaintiffs detrimentally relied on any misrepresentation. Plaintiffs have provided only conclusory allegations, which are not sufficient to raise genuine issues of fact. *E.g., Reagan Outdoor Advertising v. Lundgren, supra*, at 779. The central issue is *not*, as plaintiffs argue, whether defendants "willfully failed to develop and market Soldier Summit" in 1982-84 (App. Br. 13, 19), but whether non-sale of the property amounted to "willful misconduct." Certainly, the decision not to sell the property in 1982-84 was "willful," in that it was not by accident or chance; however, non-sale does not constitute "misconduct." Therefore, even according to the facts as contended by plaintiffs, defendants' conduct was not "willful misconduct." Accordingly, the district court properly granted summary judgment.

POINT I: DEFENDANTS' DECISION NOT TO MARKET THE SOLDIER SUMMIT PROPERTY IN 1982-84 DID NOT CONSTITUTE "WILLFUL MISCONDUCT."

Plaintiffs argue that defendants breached their fiduciary duty and breached the partnership agreement by not marketing the Soldier Summit property as recreational lots between 1982 and 1984. (App. Br. 15-18.) They further argue that the question of breach cannot be decided as a matter of law, but must be decided in a trial. (*Id.* at 20-21.) However, the district court properly held, as a matter of law, that there was no such

breach because defendants' decision not to market the property according to plaintiffs' expectations was not "willful misconduct," the standard contained in the partnership agreement. (Add. 5-6, 10-11.)[5]

A. Terms of Partnership Agreement.

Section 12 of the partnership agreement defines the scope of the general partner's discretion and liability. Paragraph 12.1 provides "exclusive and complete discretion" in managing partnership business:

> The General partner shall have *full, exclusive and complete discretion* in the management and control of the Partnership and its business of the purposes herein stated and *shall make all decisions* affecting the Partnership's affairs. The General Partner *shall have full power and authority* on behalf of the Partnership to take *any action* which the General Partner may deem necessary or advisable or incidental to the business of the partnership . . . . [Add.17, emp. added.]

The business purpose of the partnership was to acquire, own, hold, develop, improve, sell, lease, dispose of, or otherwise deal with the Soldier Summit property, and "to engage in all business activities necessary or convenient to the foregoing." (Paragraph 3; Add. 14.) Paragraph 12.4 limits general partner liability to "willful misconduct:"

> The General Partner *shall not be liable* to the Partnership or the Limited Partners for errors in judgment or for any acts of omission, whether or not disclosed, that do not constitute *willful misconduct.* [Add. 19; emp. added.]

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[5] Plaintiffs go to considerable lengths to argue the existence and elements of a fiduciary relationship between plaintiffs, as limited partners, and defendants, as general partner. (App. Br. 15-17.) While the existence of a fiduciary relationship may be open to question on the facts of this case, *see Ong International v. 11th Avenue Corp.*, 850 P.2d 447, 454 (Utah 1993) (when a partner relationship becomes adversarial fiduciary duties "may be extinguished"), defendants do not dispute the relationship for purposes of this appeal. However, what constitutes a *breach* of any fiduciary or contractual duty is defined by the standard of "willful misconduct," as contained in the partnership agreement. *See Reedeker v. Salisbury*, 952 P.2d 577, 588 (Utah App. 1998).

Accordingly, plaintiffs agreed that defendants would have "exclusive and complete" discretion to deal with the property, whether by improving and selling or merely owning and holding, and that defendants would be liable, *only* for "willful misconduct."

B. Defining Case Law.

"Willful misconduct" is a term of art commonly used in defining the scope of liability in business relationships. For example, in *Atkin Wright & Miles v. Mountain States Telephone and Tel. Co.*, 709 P.2d 330 (Utah 1985), the Utah Supreme Court held that a phone company's liability for an erroneous phone number listing is limited to situations involving gross negligence or willful misconduct. "Gross negligence" is recklessness that shows utter indifference to consequences, while "[w]illful misconduct goes beyond gross negligence in that a defendant must be aware that his conduct will probably result in injury." *Id.* at 335. In *Golding v. Ashley Central Irrigation Co.*, 793 P.2d 897, 901 (Utah 1990), the court reaffirmed this definition of willful misconduct in the context of landowner liability, restating the definition as "the intentional failure to do an act, with knowledge that serious injury is the probable result." *See also Matheson v. Pearson*, 619 P.2d 321, 322 (Utah 1980) (person guilty of willful misconduct "intends to cause harm"). Accordingly, willful misconduct is a wrongful act or omission undertaken for the purpose of causing injury to another.

The willful misconduct standard is analogous to the business judgment rule applied in cases challenging the actions of corporate officers and directors. Section 16-10a-840(4), U.C.A., states that a director or officer is not liable for any act or omission

unless "the breach or failure to perform constitutes gross negligence, *willful misconduct*, or intentional infliction of harm on the corporation or the shareholders." (Emp. added.) *See C & Y Corp. v. General Biometrics, Inc.*, 896 P.2d 47, 55 (Utah App. 1995) (applying business judgment rule to dismiss claim that former directors breached fiduciary duty to corporation). The purpose of this rule is to encourage competent persons to direct business entities by insulating them from liability for errors in judgment, as well as to prevent courts from becoming enmeshed in reviewing complex business decisions. *See Cuker v. Mikalauskas*, 692 A.2d 1042, 1046-47 (Pa. 1997) (rule historically shields directors from liability, except for willful misconduct, where they act within the scope of their discretion).

For example, in *Reedeker v. Salisbury*, 952 P.2d 577 (Utah App. 1998), this Court dismissed, as a matter of law, claims of mismanagement, breach of contract, and breach of fiduciary duty against trustees and officers of a condominium association on the grounds that the defendants engaged in no "intentional misconduct," the statutory standard applicable to nonprofit corporations. *Id.* at 584-89; *see* U.C.A. § 16-6-107. The exculpatory provision "defines the standard of care which the Trustees must breach before they can be held personally liable for their decisions as trustees." *Id.* at 588. To encourage competent persons to serve in these business capacities, the statute gives "blanket protection from personal liability for any acts amounting to less than intentional misconduct." *Id.* at 589. Moreover, the liability protection "applies universally to all claims alleging any type of breach of duty." *Id.*

An exculpatory provision shielding a general partner from liability in a limited partnership agreement is enforced in the same way as analogous statutory provisions applicable to corporations and other business entities. *See Cincinnati Bell Cellular Systems Co. v. Ameritech Mobile Phone Service*, 1996 W.L. 506906 at *12 (Del. Ch. 1996), *aff'd*, 692 A.2d 411 (Del. 1997) (principles of limited corporate director liability apply to general partner of partnership) (Add. 101). In *Cincinnati Bell*, a limited partner in a phone service company sued the general partner for breach of fiduciary duty and mismanagement, including not having an adequate marketing plan. The partnership agreement provided that the general partner "will not be liable for any loss to the Partnership or the Limited Partners by reason of any act or failure to act unless the General Partner was guilty of *willful misconduct* or gross negligence." *Id.*, W.L. at *14 (emp. added). The court granted summary judgment to the general partner on the basis that the parties had contracted to give the general partner broad discretion in conducting the business and to preclude liability for acts not amounting to willful misconduct. While the general partner's business forecasts were inaccurate, and the parties presented conflicting evidence on the wisdom of certain business decisions, "all of the questioned acts or decisions were business decisions," and therefore did not constitute willful misconduct. *Id.* at *18.

C. Application to the Present Case.

The exculpatory language in the Soldier Summit partnership agreement "defines the standard of care" that plaintiffs must prove was breached in order to hold defendants

liable for their business decisions as general partner. *See Reedeker, supra*, at 588. Accordingly, the standard for both breach of fiduciary duty and breach of the agreement is "willful misconduct." The conduct for which plaintiffs seek to hold defendants liable is the so-called "failure" to sell the Soldier Summit property as recreational lots "in the 1982-84 time frame." (App. Br. 18-19.) However, plaintiffs have failed to prove misconduct, known probable injury, or actual injury.

To begin with, non-sale of the property is not "misconduct" because "owning, holding, developing, [and] improving" the property is within the scope of the stated business purpose of the partnership, which the general partner had "exclusive and complete discretion" to carry out. In fact, defendants *were* working to develop the property between 1982 and 1984. They could not *sell* the lots during that time because they were not ready, and even if they had marketed the lots during that time, they would have lost money, as subsequent studies showed. Defendants planned to commence sales in 1984, but were delayed by the dissolution of the local town and other regulatory obstacles. Defendants continued their efforts through 1985 and made a business decision to postpone marketing the property only after receiving the January 1986 Kasper report that the proposed development would result in economic loss. These business decisions are plainly within the general partner's "exclusive and complete discretion" in dealing with the property and, therefore, cannot be characterized as "misconduct." *See Atkin Wright & Miles, supra*; *C & Y Corp. v. General Biometrics, supra*; and *Reedeker, supra*.

Plaintiffs cite the opinions of other persons to question the general partner's business decisions. For example, they refer to Jay Murphy, a limited partner, who opined that the partnership objective was to sell the property "as quickly as possible." (App. Br. 17.) However, those are his words; the partnership purpose, as stated in the partnership agreement, is not that narrow and simplistic. Moreover, limited partners have *no authority* in partnership business, while the general partner has *exclusive authority* and discretion. (Add. 16-17.) As verified by the subsequent independent marketing studies, quick sale of the lots, *without a loss*, was not possible. Plaintiffs also offer the opinion of Todd Harris, a real estate agent, that "the partnership missed a great business opportunity" to sell lots in 1982-84, and that "many lots could have been sold." (App. Br. 18; R. 1787.) However, this statement is pure conjecture and does not specify *how many* lots could have been sold, or whether those sales would have produced a profit to the partnership. Neither does this speculation diminish the general partner's "exclusive and complete discretion" to manage the property and to reach a different opinion. Conflicting evidence on the wisdom of a business decision, *even if that decision is later shown to be in error*, does not prove "willful misconduct." *See C & Y Corp., supra*, 896 P.2d at 55 (directors not liable for errors in judgment); *Reedeker, supra*, 952 P.2d at 587-89 (business mistakes do not constitute "intentional misconduct"); *Cuker, supra*, 692 A.2d at 609-10 (officers are not liable for mistakes in judgment while acting within their discretion); *Cincinnati Bell Cellular Systems, supra*, 1996 W.L. 506906 at *18 (disputed

evidence on validity of business decision does not establish "willful misconduct" or preclude summary judgment).[6]

Plaintiffs have not only failed to show misconduct in non-sale of the property, they have failed to prove defendants' knowledge of any probable injury resulting from non-sale. *See Golding, supra*, at 901. Plaintiffs claim that defendants chose not to sell the property as recreational lots because they supposedly regretted Changs receiving a partnership interest in Soldier Summit and wanted to "punish" plaintiffs by not selling the property. They claim defendants were motivated by supposed "ill will" between the parties. (App. Br. 19-20.) However, this argument defies reason. Given the disproportionate ownership interests in the partnership of only *9 percent* for plaintiffs and *81 percent* for defendants, any "injury" or "punishment" inflicted on plaintiffs through non-sale would wreak *nine times* that same injury on defendants themselves. No reasonable jury could characterize as "intentional" an injury that would fall simultaneously on defendants with an impact of *ninefold.* Mere economic loss or unrelated incidents of past conflict do not prove "willful misconduct" by defendants.[7]

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[6] It is interesting to note that even the Changs acknowledged the general market decline in real estate in 1982 when they were developing IID property in Logan, Utah. In explaining the slow sales to the Lins and other partners in January 1982, Mrs. Chang wrote:

> Due to general economic conditions in the United States we have had very little response and it is not anticipated that we will be able to sell or develop the property until the economic climate changes. [R. 1898; Add. 82.]

Accordingly, in developing the Logan property, the Changs acknowledged the same difficulties and reached the same conclusion for which they have sued defendants in this Soldier Summit case.

[7] Plaintiffs refer to the testimony of Clark Lin, a consulting engineer for ACC, as establishing that Lins decided not to market the property because of ill will toward the Changs. (App. Br. 10, 20.) However, the Clark Lin testimony is quoted out of context and misconstrued. Mr. Lin was being

Moreover, plaintiffs have failed to prove any *actual* economic loss resulting from non-sale of the property. They have presented *no evidence* of how much the partnership would have earned from sale of lots in 1982-84, and regardless of what that figure might be, they have no way of proving actual loss until the property is actually sold. Until that time, plaintiffs have no way of proving that they would have earned more in 1982-84. If the ultimate sale of the property yields *more* than was expected in 1982-84, then plaintiffs will have *no actual injury*. Until the actual sale of the property occurs at some time in the future, plaintiffs' injury is uncertain and purely speculative. Absent any actual injury, by definition, there is no "willful misconduct."[8]

In summary, plaintiffs have identified no "willful misconduct" by defendants in not selling the property between 1982 and 1984. That course of conduct was entirely within the general partner's discretion and involved no misconduct or intent to injure plaintiffs. Moreover, plaintiffs can identify no actual injury. Absent "willful

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questioned about an unsigned agreement with the Soldier Summit Special Service District in 1986 to extend the time for completion of subdivision improvements, such as roads, culverts, and waterworks. He testified that the improvements had been delayed because of disputes regarding unpaid financial contributions by certain partners. (Clark Lin Dep. at 114-16, R. 1829-30; *see* exhibit, R. 1832.) Thus, Clark Lin was referring to reasons for delayed improvements in 1986, *not* to reasons for non-sale of the lots in 1982-84. Moreover, he did not testify, as plaintiffs have represented, that Lins' decision not to sell the lots was motivated by animosity toward, and a desire to injure, the Changs.

Plaintiffs also repeatedly refer to the so-called "assault and battery" of Mrs. Chang, and the history of litigation between the parties as evidence of defendants' intent to injure the Changs. (App. Br. 9, 19.) However, the "assault and battery" of Mrs. Chang was a single slap by an errant IID employee, without the knowledge or complicity of the Lins, which occurred in *1990*, long *after* plaintiffs claim the Soldier Summit property should have been sold. (R. 1799.) As for litigation, it is the Changs who have repeatedly sued the Lins over frivolous claims such as those in this case.

[8] The absence of an actual injury also leaves plaintiffs' claims unripe for adjudication. *See, e.g., Jenkins v. Swan*, 675 P.2d 1145, 1151 (Utah 1983).

misconduct," by definition, and as a matter of law, there was no breach of any duty, either fiduciary or contractual, to plaintiffs. *See Reedeker, supra*, 952 P.2d at 589. Therefore, the district court properly granted summary judgment to defendants.

POINT II: THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE FRAUD CLAIM BECAUSE PLAINTIFFS FAILED TO PROVE ANY MISREPRESENTATION OR DETRIMENTAL RELIANCE.

Plaintiffs argue that defendants committed fraud by stating their intention to market the Soldier Summit property and then not doing so. Plaintiffs claim that they detrimentally relied on defendants' statements by taking no action. (App. Br. 24-26.) In the district court, defendants demonstrated that plaintiffs had presented no evidence of misrepresentation or detrimental reliance. (R. 1478, 1606-08.) The district court granted summary judgment, holding that even if there were misrepresentations (which was not decided), plaintiffs had presented no evidence of detrimental reliance on such representations. (R. 1904; Add. 11.)

In order to avoid summary judgment on a fraud claim, a plaintiff is required to prove all elements of the claim by clear and convincing evidence. *See Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1046 (Utah App. 1994) (such proof is required at the summary judgment stage); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Those elements include misrepresentation of an existing fact and detrimental reliance. *Andalex Resources, supra*, at 1046. A statement of future intention is not fraudulent merely because that intent is not carried out. Because a statement regarding intended future performance is not a presently existing fact, such a statement cannot

support a fraud claim unless the plaintiff can prove that the statement was made with intent to deceive, with no present intent to carry out the future performance. *Id.* at 1047. Moreover, the plaintiff must show detrimental reliance on the statement, whereby the plaintiff incurred some injury; *i.e.*, was induced to act or part with his money or property. *Cerritos Trucking Co. v. Utah Venture No. 1*, 645 P.2d 608, 611 (Utah 1982). In the present case, plaintiffs have failed to establish either intent to deceive or detrimental reliance by clear and convincing evidence. This Court may affirm the summary judgment on *either* ground. *See Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993) (summary judgment may be affirmed on any ground available to the district court even if not relied on below).

A. No Intent to Deceive.

A fraud claim may be denied as a matter of law in the absence of proof that a statement of future intent was made with intent to deceive. For example, in *Andalex Resources, supra*, a broker sued the buyer of a coal lease for future compensation allegedly promised by the buyer. This Court affirmed summary judgment for the buyer because the broker failed to present clear and convincing evidence that the buyer had no present intent to pay the future compensation. The broker's bald and conclusory assertions of fraud were insufficient. The intent to deceive cannot be inferred from "doubtful, vague, speculative or inconclusive evidence." *Id.* Similarly, in *Cerritos Trucking Co., supra*, the purchaser of real property initially represented to the seller that a second company would be participating in the purchase. When the second company

later dropped out for business reasons, the seller sought rescission on the basis of fraud. The court rejected the fraud claim, as a matter of law, because the seller presented no evidence that the purchaser did not intend to involve the second company when the statement was made. *Id.*, 645 P.2d at 611. A statement of future intent does not preclude a change of mind based on changing business considerations. *Id.* at 612.

As in the foregoing cases, plaintiffs here have presented no clear and convincing evidence that defendants did not intend to market the property when the cited representations were made. Plaintiffs recklessly repeat the vague and conclusory allegation that "defendants lied" about proceeding with the development, but they cite no specific instances and make no references to the record. (App. Br. 25.) The only specific statements referred to are three letters from Henry Yen, President of ACC, the general partner. The first letter is dated January 5, 1984, and states that "the lots [will be] on the market by spring, if all goes well." (R. 1810.) However, as indicated previously, all did not go well. The Town of Soldier Summit dissolved in April 1984, Utah County stepped in with more strict conditions, and the HUD registration for interstate marketing was rejected. These difficulties, beyond defendants' control, necessarily delayed the development. The fact that the lots were not on the market by spring does not prove Mr. Yen was "lying" when he projected they would be.

The other two letters, sent in October and December of 1984, stated that the lots were again close to being placed on the market. (R. 1811-12.) However, these letters also refer to the need for payment of partner contributions and development of a

marketing plan. (*Id.*) Plaintiffs balked at paying their contributions, and the development of a marketing plan involved the Kasper market study in 1985. When the Kasper report indicated that marketing the property as recreational lots would not be profitable, defendants decided to postpone their plans and investigate other alternatives. (Second Clark Lin Aff't, ¶¶ 12-14, R. 1517.) Again, the fact that the lots were not placed on the market does not prove Mr. Yen was "lying" when he stated they would be. When it became apparent the development would not be profitable as planned, the general partner prudently changed the plan, as it had discretion to do and was obligated to do. If the general partner had proceeded with sales in the face of the negative Kasper report and produced a loss for the partnership, plaintiffs undoubtedly would have sued the general partner for their losses. Plaintiffs have presented no evidence that Mr. Yen, through ACC, did not intend to market the property when the cited statements were made. In fact, defendants' intent to market the property is manifested by the recording of two approved plats in January 1984 and the expenditure of hundreds of thousands of dollars in making subdivision improvements. (*Id.*, ¶¶ 8-14, R. 1515-17.) In the absence of clear and convincing evidence of intent to deceive, summary judgment was properly entered on the fraud claim.

B. <u>No Detrimental Reliance</u>.

Plaintiffs claim that they detrimentally relied upon defendants' 1984 statements that the Soldier Summit project was going forward. (App. Br. 23-26.) However, plaintiffs failed to prove any injury from such claimed reliance. As the district court

ruled, "plaintiffs have failed to provide sufficient evidence to create a factual question as to whether they sustained any injury in reliance upon the [claimed] misrepresentations." (R. 1904; Add. 11.) Accordingly, the court properly granted summary judgment on this claim.

Plaintiffs have identified no actual reliance on any of the three letters from Henry Yen. In his deposition, Mr. Chang testified:

> Q: Do you recall whether you did anything in reliance on those letters?
> A: Not in particular, I can't remember.
> Q: Is there anything you refrained from doing because of those letters?
> A: No. [R. 1635-36; Add. 96-97.]

Absent any reliance, there can be no claim that the supposed misrepresentations caused injury.

Plaintiffs now argue that they relied upon the Henry Yen letters regarding anticipated marketing of the lots "by taking no action with respect to the development." (App. Br. 26.) Elsewhere, plaintiffs attempt to explain, "Plaintiffs relied upon that by failure to act. Those lies and misrepresentations were provided so that plaintiffs would take no action regarding the partnership. They did not take such action to their detriment." (*Id.* at 25.) However, exactly what action plaintiffs are referring to, which they did *not* take, is not stated and is not clear. Neither have plaintiffs shown how this unspecified inaction caused them injury. Plaintiffs acknowledge that they could not manage the partnership themselves (*id.* at 24), so that is not an action that could have been taken. Plaintiffs could be referring to a lawsuit, but they eventually did take that action, with no loss or detriment. Defendants simply cannot guess at what plaintiffs are

referring to as action they did not take, to their detriment. In the absence of detrimental reliance, there is no injury, and the statements made by Henry Yen, whether true or false, are not actionable fraud. Therefore, this Court should affirm the summary judgment.

POINT III: ALTERNATIVELY, PLAINTIFFS' CLAIMS ARE BARRED BY APPLICABLE STATUTES OF LIMITATION.

Defendants argued in the district court that plaintiffs' second, seventh, and eighth claims are also barred by applicable statutes of limitation. (R. 1468-70, 1477-79.) The district court did not decide these limitations issues, choosing instead to base its summary judgment on the grounds discussed above. However, this Court may affirm the summary judgment on alternative grounds, available to, but not relied upon by the district court. *See Higgins v. Salt Lake County, supra*, 855 P.2d at 235.

The purpose of statutes of limitation is "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Becton Dickinson and Co. v. Reese*, 668 P.2d 1254, 1257 (Utah 1983). The statute of limitations begins to run when the cause of action accrues. U.C.A. § 78-12-1. The general rule is that a cause of action accrues upon the occurrence of the last event necessary to complete the cause of action. Moreover, Utah law is clear that "mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations." *Myers v. McDonald*, 635 P.2d 84,86 (Utah 1981); *see also Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 578 (Utah App. 1996).

Plaintiffs' three pending claims are governed by different statutes of limitation. *See Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 267 n.2 (Utah 1995). The second claim, for breach of fiduciary duty, is governed by the four-year statute of limitations in section 78-12-25(3), governing claims "for relief not otherwise provided for by law." *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 890 (Utah 1993). The seventh claim, for breach of the partnership agreement, is governed by the six-year statute of limitations in section 78-12-23(2), governing actions on a contract in writing. *Koulis v. Standard Oil Co.*, 746 P.2d 1182, 1186 (Utah App. 1987). The eighth claim, for fraud, is governed by the three-year statute of limitations in section 78-12-26(3). *Koulis, supra*, at 1185.

Plaintiffs' action is barred under all three statutes of limitation. The factual claim on which plaintiffs base this action, the claim common to all three legal theories, is that defendants wrongfully failed to market the Soldier Summit property in 1982, and at least by 1984. (App. Br. 9-10, 18; Second Amended and Supplemental Complaint, ¶ 18, particularly subparagraph (b), R. 853.) Accordingly, if the claim is that defendants had a legal duty to market the property in 1982, the cause of action for breach of that duty accrued at the end of 1982, when it was clear to all partners that no sales had occurred in 1982. Plaintiffs did not file their complaint in this action until September 28, 1990 (R. 1), *seven years after their cause of action accrued.* Accordingly, this action is time-barred, and summary judgment is appropriate on that alternative basis.[9]

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[9] In his deposition, Mr. Chang conceded knowledge of his cause of action by January 1, 1983:

In the district court, plaintiffs conceded that they knew the property was not on the market from 1982 forward, but they argued that the action was still not barred by the statutes of limitation because defendants concealed the status of the project and represented that the property would soon be on the market. (R. 1746.) They argued that their cause of action did not accrue until October of 1989, when they allegedly learned that the property would not be marketed as recreational lots. (R. 1747.) However, these arguments simply attempt to create a moving target that cannot be hit with a statute of limitations. Plaintiffs' complaint, as supported by their brief on appeal, alleges that defendants breached various duties and committed fraud by failing to market the property in 1982. Their supporting evidence focused entirely on selling the property in 1982. (R. 1773, 1786-87.) Without amending their complaint, plaintiffs cannot later transform their cause of action to allege failure to market the property at all. If that is their claim, then it is *not yet ripe*, because defendants are still attempting to sell the property in the

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Q: Do you agree with the allegation that the marketing of the Soldier Summit property could and should have taken place as early as 1982?

A: Absolutely.

Q: So when you allege in [the complaint] that ACC has breached its obligations to you as a limited partner by failing to develop the property, you believe that breach started in 1982?

A: Yes.

. . . .

Q: Did you know it had not been in the market in early 1983?

A: They just told us they are not ready yet.

Q: So your answer is yes you knew that because they told you they were not ready yet?

A: Yes, I know they are not in the market.

Q: Did you complain to them at the time that ACC was not doing what it should be doing under the partnership agreement?

A: Yes.

Q: Who did you make that complaint to?

A: To American City Corporation. [R. 1508-10; Add. 85-87.]

most profitable form possible, and may still do so. *Justheim v. Division of State Lands*, 659 P.2d 1075, 1077 (Utah 1983) (court cannot render advisory opinion on issue not ripe for adjudication); *Jenkins v. Swan*, 675 P.2d 1145, 1151 (Utah 1983) (absent specific injury matter is not ripe for adjudication). Accordingly, plaintiffs' claim remains the alleged failure to market the property in 1982.

The discovery rule does not apply to the fiduciary and contract claims. Utah law is clear that in order to invoke the discovery rule, plaintiffs must first show that they did not know and reasonably could not have known of any cause of action prior to the limitations bar. *E.g., Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995); *Warren v. Provo City Corp.*, 838 P.2d 1125, 1129 (Utah 1992). Plaintiffs concede that they knew, more than six years before they filed their complaint, that the property had not been sold. They do not argue that *non-sale* of the property was concealed from them. Therefore, plaintiffs' fiduciary and contract claims, both of which are based on failure to sell the property prior to 1984, are barred. *See Anderson v. Dean Witter Reynolds, Inc., supra*, 920 P.2d at 578-79 (barring fiduciary and contract claims for loss of stock because plaintiff knew of the loss six years earlier but failed to investigate the cause of the loss).

Plaintiffs' fraud claim accrues upon "discovery by the aggrieved party of the facts constituting the fraud." U.C.A. § 78-12-26(3). Here, as discussed above, plaintiffs base their fraud claim on the letters from Henry Yen stating that the property would be on the market in the spring of 1985. (App. Br. 25-26.) Accordingly, plaintiffs' fraud claim

accrued at the end of that spring, after the specified time had passed for marketing the property. If plaintiffs claim fraud in that projection, then their claim accrued when the projection did not come to pass. Therefore, the fraud claim is barred because it accrued, at the latest, by July 1, 1985, more than five years before the complaint was filed. *See Koulis v. Standard Oil Co., supra*, 746 P.2d at 1185-86 (barring fraud claim under property lease because the plaintiff had learned the facts necessary to ascertain the fraud fourteen years earlier).

In summary, this Court should affirm the summary judgment on the alternative grounds that plaintiffs' claims are barred by applicable statutes of limitation.

CONCLUSION

Based on the foregoing, this Court should affirm the order of summary judgment for defendants on the grounds that (1) defendants engaged in no "willful misconduct"; (2) defendants made no misrepresentation on which plaintiffs relied to their injury; and (3) plaintiffs' claims are barred by statutes of limitation.

Respectfully submitted this 10th day of June, 1998.

KIRTON & McCONKIE

By: _____

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Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **Brief of Appellees** to be mailed through United States mail, postage prepaid, this 10th day of June, 1998, to the following:

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ADDENDUM

Index

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

PO-CHENG CHANG, BEATRICE H. CHANG, and AMERICAN ESTATE MANAGEMENT CORPORATION, a Utah corporation,

Plaintiffs,

vs.

SOLDIER SUMMIT DEVELOPMENT, a Utah limited partnership, AMERICAN CITY CORPORATION, a Utah corporation, MING-CHENG LIN, individually and in his capacity as Trustee, HSIUN MEI YEN LIN, individually, and in his capacity as a partner,

Defendants.

FINAL ORDER

Case No. 900905601 CN
Judge Glenn Iwasaki

BACKGROUND

On February 12, 1997, the Court heard oral arguments on cross-motions for partial summary judgment of the Plaintiffs and Defendants. Defendants were represented by David M. Wahlquist and

Blake T. Ostler of the law firm of Kirton & McConkie. Plaintiffs were represented by R. Brent Stephens and Ryan E. Tibbitts of the law firm of Snow, Christensen & Martineau.

The Court reviewed the parties' moving papers and exhibits appended thereto and heard oral argument on the motions. At the hearing the Court also received additional exhibits and deposition excerpts from the parties. At the conclusion of the hearing the Court ruled from the bench on portions of Plaintiffs' Motion for Partial Summary Judgment. On February 26, 1997, the Court issued a Memorandum Decision on the remaining portions of Plaintiffs' Motion for Partial Summary Judgment and on Defendants' Motion for Partial Summary Judgment. On February 27, 1997, the Court held a conference call with counsel wherein the Memorandum Decision was explained and clarified to counsel for the parties.

On February 28, 1997, another conference call was held with counsel for the parties wherein it was stipulated that the Court enter its order dissolving the Soldier Summit partnership pursuant to the terms of the partnership agreement and ordering that an accounting of the partnership be conducted as prayed for by the Plaintiffs in their Third Claim for Relief. Thereafter, the Court scheduled a one-day, nonjury trial on March 12, 1997, so that Defendants' claims regarding conversion of Homestead Associates funds could be tried. On March 10, 1997, the Defendants contacted the Court and indicated that they were voluntarily dismissing with prejudice their claims regarding the conversion of Homestead Associates funds.

Based on the foregoing, the Court hereby enters the following Findings and Conclusions and Order:

I. FINDINGS

A. Plaintiffs' Second Amended Complaint, filed September 6, 1995, states nine claims: 1) Dissolution of Soldier Summit; (2) Breach of Fiduciary Duty; (3) Accounting Regarding Soldier Summit; (4) Negligent Misrepresentation; (5) Breach of Separation Agreement; (6) Breach of Consulting Agreement; (7) Breach of Partnership Agreement; (8) Fraud and Misrepresentation, and (9) Specific Performance.

B. Defendants' Answer to the Complaint filed October 10, 1995, includes 20 affirmative defenses and six counterclaims: (1) Breach of Fiduciary Duty; (2) Fraud and Misrepresentation; (3) Negligent Misrepresentation; (4) Conversion; (5) Breach of Partnership Agreement, and (6) Accounting re: Homestead Associates.

C. The parties moved for summary judgment as to some of the claims, and made certain stipulations and dismissals regarding the remaining claims.

D. There are no genuine disputes as to any material facts relative to the conclusions set forth in Section II below.

II. CONCLUSIONS

A **Bench Ruling.**

1. Plaintiffs are entitled to summary judgment on Defendants' First, Second and Third Claims for Relief in Defendants' Counterclaim, except for the conversion claims regarding Homestead Associates funds, based upon the clear and unambiguous language of releases contained in the so-

called Separation Agreement and Supplemental Agreement entered into by the parties on February 8, 1982, and March 1, 1982, respectively.

2. The Supplemental Agreement referred to above created a private statute of limitation between the parties for claims that are now being asserted in the First, Second and Third Claims for Relief of the Counterclaim (except for that portion of the First Claim relating to Homestead management fees) which Counterclaim was first filed on October 9, 1995.

3. Pursuant to the private statute of limitation contained in the Supplemental Agreement, all such claims for relief were required to be filed prior to May 31, 1982, in accordance with the Supplemental Agreement. Although a Complaint was filed in May of 1982, that Complaint was dismissed in November of 1982, nearly 13 years before Defendants filed their Counterclaim.

4. The Separation Agreement also contains a clear, comprehensive and unambiguous release that precludes Defendants' claims arising prior to February 8, 1982. This release would therefore bar all claims in the First, Second and Third Claims for Relief other than the claim relating to Homestead management fees, which is dealt with below.

5. The Court further relies upon the Utah Supreme Court case of *Ong International USA v. 11th Avenue Corporation*, 850 P.2d 447, 453. n. 18 (Utah 1993) which specifically recognizes that there are situations where a person would voluntarily choose to waive existing fraud claims or even waive unknown claims of fraud. Based upon the history of the parties, and the clear terms of the Separation and Supplemental Agreements, this case does present such a situation and *Ong* is, therefore, persuasive.

6. Even if the claims contained in the First, Second and Third Claims for Relief, other than the Homestead management fee claim, are not barred by the release language of the two agreements cited above, those claims for relief would also be barred by the statute of limitations no matter whether the three-year, four-year or six-year statutes of limitations apply. The claims contained in the First, Second and Third Claims for Relief, except for the Homestead management fee claim, have long since been barred by those statutes of limitations.

7. The Court does not grant Plaintiffs' Motion for Partial Summary Judgment for the claims contained in the First Claim for Relief and Fourth Claim for Relief for conversion of management fees of Homestead Associates by the Changs, but Defendants subsequently agreed to dismiss these claims with prejudice.

B. Memorandum Decision.

The Court's Memorandum Decision of February 26, 1997, is hereby adopted and incorporated into this Final Order by this reference with the following clarification:

1. Section III.B of the Memorandum Decision states that the Soldier Summit Development Partnership Agreement grants a general partner full discretion to manage the partnership's affairs and provides that it shall not be liable for errors in judgment lacking "willful misconduct." In light of the agreement's broad language, the Court concludes that Plaintiffs' allegations are not sufficient to raise an issue of fact on that. Thus, the Court grants Defendants' motion insofar as it seeks dismissal of certain claims on this basis. This ruling also applies to Plaintiffs' Seventh Claim for Relief for breach of the Partnership Agreement to the extent it alleges

a claim of willful misconduct for failure to timely develop and market the Soldier Summit property. To the extent that Plaintiffs' Seventh Claim for Relief alleges claims other than a claim for willful misconduct or the claims relating to the First Amendment of the Partnership Agreement which are ruled upon in the Memorandum Decision, Defendants' motion is denied as to any such claims. Plaintiffs subsequently indicated that there are no additional claims in the Seventh Claim for Relief other than the willful failure to develop claims, which have not otherwise been addressed by the Court in the Memorandum Decision or this Final Order. Therefore, summary judgment is granted against Plaintiffs and in Defendants' favor upon all willful failure to develop claims in Plaintiffs' Second and Seventh Claims for Relief.

III. STIPULATION AND AGREEMENT OF THE PARTIES

A. Based upon a stipulation of the parties, this Court will order a decree of dissolution and an accounting of the Soldier Summit Partnership in accordance with Utah law and pursuant to the terms of paragraph 17 of the Certificate and Agreement of Limited Partnership of Soldier Summit Development dated November 1, 1978, as prayed for in Plaintiffs' First and Third Claims for Relief contained in their Second Amended and Supplemental Complaint, filed on September 6, 1995; and:

1. Po Chang shall be entitled to payment from SSD of 2% of all proceeds from SSD's real property pursuant to the Consulting Agreement.

2. Plaintiffs shall be obligated to pay 9% of the legitimate partnership expenses which arose after March 1, 1982, in accordance with the Court's ruling above.

B. Defendants voluntary agreed that their claims regarding the Homestead Associates as set forth in Defendants' First and Fourth Claims for Relief should be dismissed with prejudice.

IV. ORDER

Based on the foregoing, the Court hereby orders, adjudges and decrees that Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion for Partial Summary Judgment be and hereby are granted in part and denied in part, as set forth above and in the Memorandum Decision. Plaintiffs' claims for dissolution and an accounting of Soldier Summit are hereby granted in accordance with the terms set forth above. Each of Defendants' claims for conversion of Homestead funds are dismissed with prejudice. All claims of the parties set forth in their pleadings not reduced to summary judgment herein or otherwise dealt with by this Order are hereby dismissed. This Order disposes of all issues raised by the pleadings and will become final upon entry.

DATED this 18th day of Aug., 1997.

BY THE COURT:

GLENN IWASAKI
District Court Judge

APPROVED AS TO FORM:

David M. Wahlquist
N:\13877\2\DISSOLVI.ORD

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PO-CHENG CHANG, et. al.,	:	MEMORANDUM DECISION
Plaintiffs,	:	CASE NO. 900905601 CN
vs.	:	Judge Glenn K. Iwasaki
SOLDIER SUMMIT DEVELOPMENT, et. al.,	:	
Defendants.	:	

The above-entitled matter comes before the Court pursuant to cross-motions for partial summary judgment.

The Court heard oral argument on the motions on February 12, 1997, at which time the parties were represented by counsel. The Court ruled on one aspect of plaintiffs' Motion for Partial Summary Judgment and took the remaining matters under advisement. Based upon the motions, memoranda of the parties (including supplemental memoranda), the exhibits attached thereto, the arguments of counsel, and for good cause shown, the Court hereby enters the following ruling.

I. BACKGROUND

Plaintiffs' Second Amended Complaint, filed 9/6/95, states nine claims: (1) Dissolution of Soldier Summit, (2) Breach of Fiduciary Duty, (3) Accounting Re: Soldier Summit, (4) Negligent Misrepresentation, (5) Breach of Separation Agreement, (6) Breach of Consulting Agreement, (7) Breach of Partnership Agreement, (8) Fraud and Misrepresentation, and (9) Specific Performance.

Defendants' Answer to the Complaint, filed 10/10/95, includes 20 affirmative defenses and six counterclaims: (1) Breach of Fiduciary Duty, (2) Fraud and Misrepresentation, (3) Negligent Misrepresentation, (4) Conversion, (5) Breach of Partnership Agreement, and (6) Accounting re: Homestead Associates.

II. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court has already granted plaintiffs' motion for summary judgment as it relates to counterclaims 1, 2 and 3 (Breach of Fiduciary Duty, Fraud and Misrepresentation, and Negligent Misrepresentation). The Court does not further address those issue here.

Plaintiffs also seek summary judgment on claim 9 of their Complaint (Specific Performance). Defendants have also moved for summary judgment on this claim.

On March 1, 1992, the parties signed a "First Amendment to Certificate and Agreement of Limited Partnership of Soldier Summit Development." Defendant American City Development Corp., controlled by the defendant Lins, acted as the General Partner of the partnership. Paragraph 5 of that agreement provides:

> Notwithstanding any other provision of the Partnership Agreement, any and all debts, obligations, liabilities, bills, costs or expenses of the Partnership (whether known or unknown) incurred or arising prior to March 1, 1982 and interest accruing thereon after March 1, 1982 (the "Pre-Existing Obligations") shall be borne and discharged by the General Partner and Jay L. Murphy in the ratio that their respective percentage interests bear to one another. All allocations of profit and loss and distributions shall be computed as though the Pre-Existing Obligations were the individual obligations of the General Partner and Jay L. Murphy in such proportions, and the amounts that would otherwise be distributed to the General Partner and Jay L. Murphy shall be used to pay the Pre-Existing obligations. To the extent that the amounts allocated to the General Partner and Jay L. Murphy are not sufficient to discharge the Pre-Existing obligations, the General Partner and Jay L. Murphy shall contribute to the Partnership (without affecting the rights of the other Partners) sufficient cash to discharge the Pre-Existing obligations as they fall due. Except to the extent set forth above, the Partners shall each bear their pro-rata share of any liabilities, obligations, debts or similar items arising on or after March 1, 1982.

Defendants have shown the mortgage on the partnership's property as a liability, expense, or debt on the books and records of the partnership. Plaintiffs contend that in doing so, defendants have violated the above provision that allocated the partnership's debts. Defendants admit that they are responsible to pay the entire mortgage on the property (including those portions which were due in the future since the underlying debt had been incurred prior to March 1, 1982), but respond that they are entitled to receive back their total cash contributions, including initial and additional, subsequent contributions.

According to paragraph 5, and "[n]otwithstanding any other provision of the Partnership Agreement," all pre-March 1982 debts or obligations of the partnership are deemed personal obligations of the General Partner. There is no suggestion that the General Partner be credited for these payments as cash contributions to the partnership. Instead the agreement requires all preexisting obligations to be "borne and discharged" as "individual" obligations of the General Partner. Plaintiffs gave up their substantial interests in other assets in order to receive a partnership free of all debts. It would be contrary to the intent of the parties to explicitly preclude the mortgage payments as debts of the Limited Partner, while allowing those payments as contributions of the General Partner.

Based on the foregoing, plaintiff's Motion for Partial Summary Judgment is granted as to this issue.

III. DEFENDANTS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants seek dismissal--at least against certain defendants--of all nine of the claims set forth in plaintiffs' Complaint. Many of defendants' theories for dismissal apply to more than one claim. The Court will address the merits of these theories, and then determine which of the claims should be dismissed as a result of the Court's conclusions.

A. Alter Ego

Defendants contend that certain defendants should be dismissed from certain claims because those defendants were not involved in those claims. Plaintiffs respond that all of the defendants should remain in the case on all claims because they are all alter egos of each other. After examining the evidence on this issue, the Court concludes that there is sufficient evidence in this case from which a finder of fact could conclude that the defendants are the alter egos of one another. Thus the Court denies defendants' motion insofar as it seeks dismissal of certain claims against certain defendants on this basis, including claim 1 (Dissolution of Soldier Summit), claim 3 (Accounting Re: Soldier Summit), claim 4 (Negligent Misrepresentation), claim 5 (Breach of Separation Agreement), claim 6 (Breach of Consulting Agreement), claim 7 (Breach of Partnership Agreement), claim 8 (Fraud and Misrepresentation), and claim 9 (Specific Performance).

B. Willful Misconduct

The Soldier Summit Development partnership agreement grants the general partner full discretion to manage the partnership's affairs and provides that it shall not be liable for errors in

judgment lacking "willful misconduct." Defendants contend that there was no such breach. Among other evidence, they point to two market studies that state that development of the property would lose money. Plaintiffs respond that failing to develop the property while withholding information constituted willful misconduct. In light of the agreement's broad authority to the general partner, the Court concludes that plaintiffs' allegations are not sufficient to raise an issue of fact. Thus the Court grants defendants' motion insofar as it seeks dismissal of certain claims on this basis, including claim 2 (Breach of Fiduciary Duty).

C. Detrimental Reliance

In order to state a claim for fraud or misrepresentation, plaintiffs must provide some evidence that they relied to their detriment on the alleged misrepresentation. Defendants argue that plaintiffs have failed to provide any evidence that they have sustained any injury in reliance upon defendants' alleged misrepresentations regarding either development prospects for the partnership property or financial information supplied by defendants. Plaintiffs have submitted the affidavit of Todd Harris, a real estate agent, stating that "with relatively little effort or expense," the property could have been placed on the market and that there was "considerable interest" by the local community in the project. He also states that "many" lots could have been sold from 1982-1984 and that the partnership missed out on a "great business opportunity."

The affidavit--apart from being speculative--does not assert nor attempt to assert that the development would have been profitable had it gone forward. Defendants' own marketing study admits that some lots would be sold, but concludes that under the market conditions, the development would result in a significant financial loss to the partnership. The fact that a local realtor says he could have sold some of the lots during a two-year period does not contradict defendants' position.

Finally, Mr. Chang, in his affidavit, could not explain anything he did or did not do in reliance upon the alleged misrepresentations.

Even assuming that defendants made misrepresentations, and that the claims are not barred by the statute of limitations, the Court concludes that plaintiffs have failed to provide sufficient evidence to create a factual question as to whether they sustained any injury in reliance upon the misrepresentations. Thus the Court grants defendants' motion insofar as it seeks dismissal of certain claims on this basis, including claim 4 (Negligent Misrepresentation), and claim 8 (Fraud and Misrepresentation).

D. Accord, Satisfaction, and Release

Defendants claim that they are entitled to dismissal of claim 5 (Breach of Separation Agreement) under a theory of accord, satisfaction, and release. They contend that any problems regarding the separation agreement were worked out by the parties when they signed a March 1, 1982 "Satisfaction of Debt." The document releases only indebtedness that "has not been specifically disposed of in some other manner by an instrument executed pursuant to the Closing contemplated by or delivered pursuant to the" February 8, 1982 agreement. Claim 5, as stated in Plaintiffs' Complaint, is based on the alleged breach of the "March 1982 Separation Agreement."[1]

Defendants argument appears to be well taken. The release specifically disposed of claims arising from the Separation Agreement. Thus the Court concludes that the "Satisfaction of Debt" releases this claim and defendants' motion is granted as to this claim.

E. Claim 7 (Breach of Partnership Agreement)

Claim 7 alleges:

> The Defendants have breached the Soldier Summit Partnership Agreement and Amendment by refusing to assume all debts of the partnership, and by willfully refusing to develop the property when reasonable, legitimate opportunities were available, and by refusing to abide by the Amendment to the Partnership Agreement.

Defendants contend that they had no contractual duty to further develop and market the partnership property because the partnership's purposes included holding and leasing the property. Plaintiffs respond that questions of fact preclude summary judgment on defendants' duty to develop and market the property.

Defendants also argue that this claim is barred by the six-year statute of limitations governing written contracts. Plaintiff responds that defendants were concealing information as to the status of and their plans for the development and thus the statute

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[1]This reference to a "March 1992 Separation Agreement" is confusing as there is a February 1992 Separation Agreement and a March 1992 Amendment to the Agreement. The Court determines that, in drafting their Complaint, plaintiffs intended to mean the former because the nine particulars of claim 5 appear to refer to the former and not the latter.

of limitations should be tolled.

The Court concludes there are questions of fact that preclude summary judgment on this claim. There is some evidence that defendants refused to provide plaintiffs requested information regarding the partnership and that defendants may have misled plaintiffs regarding the development prospects for the property. Thus the Court denies defendants' motion for summary judgment as to this claim.

F. Claim 9 (Specific Performance)

In this claim, "Plaintiffs pray for an order of the Court that the Defendants specifically perform the Separation Agreement, the Consulting Agreement and the Soldier Summit Amendment." The Court has made three previous rulings that affect summary judgment on this claim.

The Court has already granted plaintiffs' motion for summary judgment on one aspect of claim 9 (in Section II, above), denying defendants the right to credit their mortgage payments as capital contributions toward the partnership.

The Court has also ruled (in section III,D, above) that the parties' March 1, 1982 "Satisfaction of Debt" specifically disposed of claims arising from the Separation Agreement, unless those claims are specifically disposed of in some other manner at the time the "Satisfaction of Debt" was signed or pursuant to the separation agreement.

Finally, the Court has ruled (in section III,E, above) that there are questions of fact that preclude summary judgment as to partnership agreement.

With the briefing before the Court, the Court is unable to make any further rulings as to this claim.

Based on the foregoing, plaintiffs' motion for partial summary judgment is granted, and defendants' motion for partial summary judgment is granted in part and denied in part.

Dated this 26th day of February, 1997.

STATE OF UTAH THIRD DISTRICT

GLENN K. IWASAKI
DISTRICT COURT JUDGE

#13249

CERTIFICATE AND AGREEMENT
OF
LIMITED PARTNERSHIP
OF

SOLDIER SUMMIT DEVELOPMENT

THIS CERTIFICATE AND AGREEMENT OF LIMITED PARTNERSHIP (the "Agreement") is entered into by and between AMERICAN CITY DEVELOPMENT CORPORATION, A Utah corporation (referred to herein as the "General Partner"), and JAY L. MURPHY (referred to herein as the "Limited Partner") for the purpose of forming a limited partnership (the "Partnership") which shall be subject to the following terms and conditions:

1. Formation: The General Partner and the Limited Partner (who are collectively referred to herein as the "Partners") hereby form a limited partnership pursuant to the provisions of the Utah Code Annotated, Title 48, Chapter 2 (1953), otherwise known as the Uniform Limited Partnership Act of the State of Utah. The Partners agree promptly to file this agreement and to perform all other acts necessary to comply with the requirements for the formation and operation of a limited partnership under the laws of the State of Utah.

2. Name: The name of the Partnership shall be SOLDIER SUMMIT DEVELOPMENT.

3. Character of Business: The purpose of the Partnership and the character of its business shall be to engage in the business of acquiring, owning, holding, developing, improving, selling, leasing, disposing of and otherwise dealing with real property located in Soldier Summit, Utah County and Wasatch County, State of Utah, and to engage in all business activities necessary or convenient to the foregoing. The Partners have hereto acquired approximately 4,000 acres of unimproved real estate located in Soldier Summit, Utah.

4. Principal Place of Business: The principal place of business of the Partnership shall be located at 1060 Beneficial Life Tower Building, Salt Lake City, Utah 84111, or at such other place as the General Partner may designate from time to time by written notice to the Limited Partner. The General Partner may, at his descretion, also establish additional places of business from time to time.

5. Partners: The name and residence address (or in the case or a partnership or corporation, its principal place of business) of the General Partner is:

NAME	ADDRESS
American City Development Corporation	1060 Beneficial Life Tower 36 South State Street Salt Lake City, Utah 84111

The name and residence address (or in the case of a partnership or corporation, its principal place of business) of the Limited Partner is:

NAME	ADDRESS
Jay L. Murphy	797 17th Avenue Salt Lake City, Utah 84103

6. Term: The partnership shall commence on the date this agreement is first filed in the office of the County Clerk of Salt Lake County, Utah, and shall continue thereafter for a period of thirty (30) years unless sooner terminated according to applicable law or the provisions of this agreement.

7. Capital Contributions:

7.1 Each Partner has contributed the sum set forth in Section 7.2 in cash to the partnership. The Partners have agreed to make additional contributions to the partnership in cash according to percentage interest set forth in Section 7.2 to pay for the land cost and all associated development costs. Such additional cash contribution may be designated by the General Partner from time to time by written notice to the Limited Partner. If any Partner elects not to contribute designated shares, the General Partner may adjust his percentage interest in the Partnership accordingly.

7.2 The respective interest of the Partners in the capital and the profits and losses of the Partnership shall be as follows:

PARTNER	CASH CONTRIBUTION	PERCENTAGE INTEREST
American City Development Corporation	$270,000.00	90.00
Jay L. Murphy	$ 30,000.00	10.00
TOTAL	$300,000.00	100.00

8. Status of Limited Partners:

8.1 No Limited Partner shall be personally liable for any debts or obligations of the Partnership or for any of the losses of the Partnership beyond the amount contributed by him or it to the capital of the Partnership and his or its share of undistributed profits of the Partnership.

8.2 No Limited Partner shall take part in the management of the business of the Partnership or transact any business for the Partnership.

8.3 No Limited Partner in his or its capacity as Limited Partner shall have authority or power to sign for or to bind the Partnership.

8.4 No Limited Partner shall be entitled to the return of any amount contributed by him or it to the capital of the Partnership in accordance with the provisions of Section 17.

8.5 In the event additional Limited Partners are admitted pursuant to Section 16 hereof, no Limited Partner shall have priority over any other Limited Partner as to the return of capital contributions or as to net profits, net losses or distributions.

9. Allocation of Profits and Losses:

9.1 Except as set forth in Section 9.2, the net profits and losses of the Partnership in any taxable year, and each item of income, gain, loss, deduction or credit, shall be allocated among and distributed to the Partners in the proportions which their respective interests in the capital of the Partnership bear to each other.

9.2 The terms "net profits" and "net losses" shall mean the net profits or net losses of the Partnership as determined on the basis of accounting used for Federal income tax purposes.

9.3 Nothing in this Section 9 shall alter the limitation on a Limited Partner's personal liability for any debts or obligations of the Partnership as set forth in subsection 8.1.

9.4 The expense reimbursement due to the General Partner pursuant to Section 11 of this Agreement shall be treated as an expense of the Partnership in determining net profits and net losses.

10. Distributions:

10.1 Distributions in the Ordinary Course of Business. The General Partner shall distribute to the Partners, in the proportions provided by Section 10.3, substantially all of the cash held by the Partnership; provided, however, that all such distributions shall be subject to maintaining the Partnership in a sound cash and financial position.

10.2 Extraordinary Distributions. Any distributions of property other than cash, either in connection with the dissolution of the Partnership, refinancing of its assets or otherwise, may be when there is sufficient cash or other property in the Partnership which the General Partner, in his sole discretion determines is not needed in the operation thereof, or as a reserve against future operating cash needs or contingent liabilities.

10.3 Allocations of Distributions. All distributions made pursuant to this Section 10 shall be allocated as follows:

(a) The Partners shall first receive an amount equal to their total cash capital contributions to the Partnership up to that time as reduced by all cash contributions theretofore made to them pursuant to this Agreement.

(b) The amount of any distributions in excess of the amounts distributed pursuant to subsection (s) above shall be allocated among the Partners in proportion to their respective interests in the Capital and Profits and Losses of the Partnership.

10.4 Procedure Upon Distribution of Property Other Than Cash. If the Partnership shall be dissolved prior to sale of all its non-cash assets, the value assigned to such assets for purposes of distribution shall be (a) the value agreed upon by all the Partners, or, in the event of disagreement, (b) the appraised value established pursuant to the following: The General Partner and the Limited Partners shall each appoint an appraiser. In the event the two cannot agree upon a value, they shall mutually appoint a third appraiser whose decision shall be conclusive, but shall be limited to the value somewhere in between the values arrived at by the two original appraisers.

11. Expenses. The Partnership shall pay for any and all expenses incurred by the General Partner and each of them for and on behalf of the Partnership and shall reimburse the General Partner and each of them for any such expenses advanced by them.

12. Rights and Powers of the General Partner.

12.1 The General Partner shall have full, exclusive and complete discretion in the management and control of the Partnership and its business of the purposes herein stated and shall make all decisions affecting the Partnership's affairs. The General Partner shall have full power and authority on behalf of the Partnership to take any action which the General Partner may deem necessary or advisable or incidental to the business of the Partnership and to execute and deliver on behalf of the Partnership such documents or instruments as the General Partner deems appropriate in its conduct of the Partnership business. No person, firm or corporation dealing with the Partnership shall be required to inquire into the authority of the General Partner to take any action or make any decisions.

12.2 In addition to any other rights and powers which it may possess, the General Partner shall have all specific rights and powers required for or appropriate to their management and control of the Partnership business, including by way of illustration but not by way of limitation the following rights and powers, all costs and expenses in connection with which shall be paid for by the Partnership:

(a) To borrow money, and, if security is required therefor, to mortgage or subject to any other security device any portion of the property of the Partnership; to obtain replacements of any mortgage or other security device, and to prepay, consolidate, or extend any mortgage or other security device, all of the foregoing at such terms and in such amounts as it deems in its absolute descretion to be in the best interests of the Partnership.

(b) To place record title to, or the right to use, Partnership assets in the name of the General Partner or the name or names of a nominee or nominees for any purpose convenient or beneficial to the Partnership.

(c) To acquire and enter into any contract of insurance which the General Partner deems necessary and proper for the protection of the Partnership, for the conservation of its assets, or for any purpose convenient or beneficial to the Partnership.

(d) To employ persons in the operation and management of the Partnership properties. Such services may be performed by the General Partner or by companies that are affiliated with the General Partner, and standard fees will be paid by the Partnership for such services as determined by the General Partner.

(e) To employ attorneys and/or accountants to represent the Partnership.

12.3 The General Partner shall devote himself to the Partnership's business to the extent that the General Partner, in his sole discretion, determines to be necessary for the efficient conduct thereof, but nothing herein contained shall preclude the General Partner or any officer, director, employee or other person holding a legal or beneficial interest in or otherwise related to the General Partners from engaging or possessing an interest in other business ventures of every nature and description, including business ventures substantially identical to the Partnership, and neither the Partnership nor the Limited Partners shall have any interest by virture of this Agreement in any such other business ventures or the income or profits derived therefrom.

12.4 The General Partner shall not be liable to the Partnership or the Limited Partners for errors in judgment or for any acts of omission, whether or not disclosed, that do not constitute willful misconduct. The Partnership shall indemnify the General Partner but only from the assets of the Partnership, against any loss or damage incurred by the General Partner by reason of any act performed by him in good faith on behalf of the Partnership.

13. Books of Account, Tax Returns and Reports:

13.1 The General Partner shall maintain proper books of account in accordance with generally accepted accounting open to inspection by the Limited Partners at the principal office of the Partnership during normal business hours. The taxable year of the Partnership shall be the calendar year unless otherwise determined by the General Partner.

13.2 The General Partner shall supervise the preparation and filing of all tax returns for the Partnership and shall make such tax elections and determinations on behalf of the Partnership as appear to it to be appropriate. Within a reasonable time prior to April 15 of each year, the General Partner shall furnish to the Partners all necessary tax reporting information with respect to the Partnership.

13.3 Within a reasonable time after the close of each fiscal year, the General Partner shall cause to be mailed to each Partner a report of the financial condition of the Partnership as of the close of the year and of the results of its operations for such year.

14. Bank Accounts: All funds of the Partnership shall be deposited in the name of the Partnership in such bank account or accounts as shall be designated by the General Partners. All withdrawals therefrom shall be made upon checks signed on behalf of the Partnership by the General Partners or such other person or persons designated by the General Partner.

15. Transfer of Partnership Interests:

15.1 The Partnership interest of the General Partner may be assigned, transferred or otherwise disposed of with the consent of a majority in interest of the other Partners, which consent shall not be unreasonably withheld.

15.2 The Partnership interest of a Limited Partner may be transferred, assigned or otherwise disposed of, either voluntarily or involuntarily, with the prior written consent of a majority in interest of the Partners, which consent shall not be unreasonably withheld.

15.3 No assignee of the whole or any portion of a Limited Partner's interest in the Partnership shall become a substituted Limited Partner in the place of his assignor unless the following additional conditions are satisfied:

(a) The assignee shall have executed and delivered to the Partnership such instruments as the General Partner may deem necessary or desirable to effect such transfer and substitution including a power of attorney similar in form to that signed by the assignor and a written acceptance and adoption by the assignee of the provisions of this agreement.

(b) The General Partner's consent in writing to the assignee becoming a substituted Limited Partner.

15.4 Upon the death or legal incompetency of an individual Limited Partner (or in the case of a Limited Partner that is a corporation, association, partnership, joint venture, or trust, the dissolution of such Limited Partner), the personal representatives, guardian or other successor in interest of such Limited Partner shall have all of the rights of a Limited Partner for the purposes of settling the estate or business of such Limited Partner possessed to assign such Limited Partner's interest in the Partnership assignee to become a substituted Limited Partner subject to the conditions of subsection 15.3.

16. Admission of New Limited Partners: The General Partner shall have the right to cause the Partnership to sell additional interests in the Partnership and to admit additional Limited Partners to the Partnership upon such terms and conditions as may be designated by the General Partner; provided, however, that the General Partner shall first offer such interests to the Partners at the price and upon the terms the General Partner proposes to sell such interests.

17. Dissolution:

17.1 The Partnership shall be dissolved upon the occurrence of any of the following events:

(a) The expiration of the term of the Partnership specified in Section 6.

(b) The bankruptcy, receivership, liquidation or dissolution of all of the General Partners.

(c) The resignation of the General Partner unless within sixty (60) days after such resignation a successor General Partner is elected by a majority in interest of the Limited Partners.

(d) Sixty (60) days after the General Partner's written notice of election to terminate the partnership, which written notice may be given to the Limited Partners by the General Partner at any time.

(e) An event which makes it unlawful for the Partnership business to be continued.

17.2 The Partnership shall not be terminated by the death, legal disability, bankruptcy, or dissolution of any Limited Partner.

17.3 Upon dissolution of the Partnership, the General Partner shall immediately commence to wind up and liquidate the Partnership business. In liquidating the Partnership business, the General Partner may either sell all or part of the Partnership assets and distribute the proceeds therefrom, to the extent sufficient, shall be applied and distributed in the order provided by law. The General Partner shall not be personally liable to the Limited Partners for the return of their contributuons unless such insufficiency is the result of the willful misconduct of the General Partner.

18. Amendments:

18.1 This Agreement may be amended by written consent of the Partners owning seventy percent (70%) or more of the interests in the Partnership; provided, that to the extent this Agreement is used as a certificate of limited partnership for the purpose of filing or recording under state law, the General Partner, without the consent of any Limited Partners, shall have the right to amend this Agreement for the purpose of reflecting the admission, withdrawal, substitution or change in capital contribution of a Limited Partner, or any other change which the General Partner is authorized to approve.

18.2 Notwithstanding Section 18.1, no amendment shall change the Partnership to a general partnership, change the term of the Partnership, or change the liability of the General Partner or the limited liability of the Limited Partners.

19. Notices: Notices required or permitted by this Agreement shall be in writing and shall be sent in the case of the Partnership to the principal place of business of the Partnership and, in the case of the Limited Partners, to the address of each shown on the records of the Partnership.

20. Validity: If any provision of this Agreement or the application of such provision to any person or circumstances shall be held invalid, the remainder of this Agreement or the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

21. Section Headings: All section headings of this Agreement are for convenience of reference only and are not intended to qualify the meaning of any section.

22. Binding Effect: This Agreement shall be binding upon and shall inure to the benefit of the Partners, their respective legal representatives, heirs, successors and assigns.

23. Governing Law: This Agreement shall be governed and construed in accordance with the laws of the State of Utah.

24. Integration: This Agreement contains the entire agreement of the parties and supersedes all prior understandings whether written or oral.

IN WITNESS WHEREOF, the parties have executed this Certificate and Agreement of Limited Partnership as of the 1st day of November, 1978.

GENERAL PARTNER:

ATTEST: American CITY DEVELOPMENT CORPORATION

Robert A Burdette

By _____

Its _____

LIMITED PARTNER:

ATTEST:

Robert A Burdette

JAY L. MURPHY

STATE OF UTAH)
: SS
COUNTY OF SALT LAKE)

On the 1st day of November, 1978, personally appeared before me PO CHENG CHANG, who being by me duly sworn, did say that he is the President of CITY DEVELOPMENT CORPORATION, a Utah Corporation, and that the foregoing instrument was signed on behalf of said corporation by authority of its Bylaws or a resolution of its Board of Directors, and said officers acknowledged to me that said corporation executed the same.

NOTARY PUBLIC
Residing at Salt Lake City, Utah

My Commission Expires:

5-31-82

STATE OF UTAH)
: SS
COUNTY OF SALT LAKE)

On this 1st day of November, 1978, personally appeared before me, JAY L. MURPHY, the signer of the within instrument, who, being duly sowrn, duly acknowledged to me that he executed the same and that the statements set forth therein are true.

NOTARY PUBLIC
Residing at Salt Lake City, Utah

My Commission Expires:

5-31-82

AGREEMENT

THIS AGREEMENT is made and entered into this 8th day of February, 1982, by and between MING CHENG LIN and HSIUN MEI YEN LIN, (collectively referred to herein as "Lin") and PO CHENG CHANG and BEATRICE H. CHANG (collectively referred to herein as "Chang").

Recitals

A. The parties are each shareholders of, or otherwise hold a financial interest in, the following corporate entities: INTERNATIONAL INVESTMENT & DEVELOPMENT Corporation ("IID"), INTERNATIONAL CONSOLIDATED ENTERPRISES ("ICE"), AMERICAN ESTATE MANAGEMENT("AEM"), and AMERICAN CITY DEVELOPMENT ("ACD").

B. The parties, IID, AEM or ACD are partners in the following partnership entities: ECHO CREEK RANCH, SOLDIER SUMMIT DEVELOPMENT, INTERNATIONAL PROPERTY MANAGEMENT, WILSHIRE PLAZA DEVELOPMENT, LAS VEGAS ASSOCIATES, LOGAN PLAZA ASSOCIATES, HOMESTEAD ASSOCIATES, and LOG HAVEN ASSOCIATES.

C. The parties desire to end certain of their existing business relationships, and by this Agreement to express their mutual agreement as to the manner in which they shall conduct themselves with respect to the aforementioned corporate and partnership entities during the duration of the terms of this Agreement and to bind themselves as to how their various interests are to be divided and distributed or held.

NOW, THEREFORE, in consideration of the mutual promises and undertakings contained herein, it is agreed between the parties as follows:

1. Acknowledgement of Recitals. The parties hereby stipulate and acknowledge that each and every fact or statement set forth in the Recitals of this Agreement is true.

~~2. Continuance of Orders. The Temporary Restraining Order~~ and Order both dated January 29, 1982 issued ~~by~~ the Third Judicial District Court in and ~~for Salt~~ Lake County, State of Utah in Chang et al v. ~~Lin et~~ al, C82-703 shall remain in effect until said ~~action~~ is dismissed pursuant to the terms of this ~~Agreement~~ and the hearing presently scheduled for February 8, ~~1982, in the action shall be continued without date.~~

3. Communications With Employees ~~or Other Third Parties~~. The parties and each of them agree not to communicate in any way with any employee ~~or any third party~~ with respect to the Businesses, except to the extent of communications made in the ordinary course of business, or except to make a statement substantially as follows: "A difference in business philosophies has arisen between us, and we are in the process of examining our business relationship to determine the extent to which, if any, it will be maintained. Pursuant to negotiations, we may, as to some or all of our mutual enterprises, divide our assets and go each his separate way." In no event shall one party disparage,

2. Lawsuit and Meetings. Concurrently herewith, the parties shall cause the action titled Chang et al v. Lin et al, District Court of Salt Lake County Civil No C-82-703 to be dismissed without prejudice; at the closing, the parties shall cause said action to be dismissed with prejudice. Any actions taken by the stockholders and directors of IID, ICE, AEM, and/or ACD shall not be effective until the Closing

Lin will take such actions as are necessary to cause Commercial Security Bank to issue the letter of credit to SCB, Bangkok, Thailand, in the amount of approx $60,000. Chang agrees not to encumber the Draper, Utah property with debts other than the CSB credit line. Chang agrees to use his best efforts to secure Lin's release from liability with respect to said credit line at the earliest time and not to increase said line beyond $60,000.00 ---> in excess of $65,000 with Lin's written consent. until IID and Mr. Lin's guaranty are released.

malign, or in any way detract from the business or professional reputation of the other.

March 1, 1982.

4. Chang's Obligation to Manage and Report. For the period commencing with the date of this Agreement and continuing until ~~February 28, 1982~~ (the "Closing Date") Chang shall manage the day-to-day operations of the Businesses, but shall not incur debt or encumber property without Lin's written consent. Chang shall not make any payments for special items out of the ordinary course of business expenditures.

5. Line of Credit. Lin shall execute such instruments or agreements and take such actions as may be necessary or appropriate to maintain the line of credit with Commercial Security Bank which line of credit exists for the benefit of ICE; provided that Chang shall indemnify Lin against any liability or loss with respect to such line of credit.

6. Intercorporate Transfer of Assets. Prior to the Closing Date, IID, Lin or ACD shall transfer, convey or assign (or cause to be transferred, conveyed or assigned) to AEM the following properties:

(a) Real property located at 3772 South 2300 East, Salt Lake City, Utah.

(b) Real property known as the Twin Falls K-Mart corner lot, Twin Falls, Idaho.

(c) Improved real property known as Highland Terrace Apartment Complex, Salt Lake City, Utah. Lin agrees to pay the debt presently owing on this property (approximately).

(d) All shares of the common stock at Prudential Federal Savings & Loan owned or held by IID.

(e) An undivided twenty-five percent (25%) interest in all cash, savings accounts, checking accounts, receivables and similar assets held or owned, either directly or indirectly by IID as of the Closing Date; provided such amount shall ~~equal at least $20,000~~ [illegible] sum of such [illegible] accounts as are outstanding on the date hereof.

(f) The Cadillac and the Impala Chevrolet station wagon currently owned by IID and driven by Chang, subject to any debt secured by either such vehicle. (Cadillac [illegible] Impala [illegible])

(g) All office furniture, fixtures and equipment located at 1360 Beneficial Life Tower and the interest of IID as tenant under the lease for such premises, together with any debts against such accounts [illegible] the computer system. (All furniture, fixtures & equipment)

(h) Fee interest in and to certain real property known as View Crest Lot II located in Salt Lake City, Utah.

(i) All of that certain real property located in Draper, Utah owned by IID, it being understood that such real property is currently encumbered by a deed of trust securing the line of credit to Commercial Security Bank referred to in Section 5 above.

(j) All shares of stock in ICE owned by IID.

~~(k) Forty percent (40%) of the Creditor's position in amounts owed to IID by Homestead Associates.~~ In no event shall [illegible] such [illegible] exceed forty percent.

(l) An interest as a general partner in Soldier's Summit Development Company equal to a ~~ten~~ nine percent (~~10%~~ 9.0%)

~~(k) Forty percent (40%) of the amounts owed to IID by Homestead Associates. Less the amounts presently owed by Homestead Associates to Chang.~~

(k) The following amount:
Forty percent of the sum of (1) the present amount of the debt owed by Homestead Assoc. to Chang and (2) the present amount of the debt owed by Homestead Assoc. to IID
Less
The present amount of the debt owed by Homestead Assoc. to Chang.

To the extent possible, said transfers shall be structured to minimize the tax consequences to the parties.

total
interest in the capital, profits and losses and distributions in such partnership. Except as specifically noted herein

All of the foregoing transfers, conveyances or assignments shall be by special warranty deed, in the case of personal property, or an equivalent bill of sale or assignment. Personal property shall be transferred or assigned subject to no liens or encumbrances. Real property shall be transferred subject only to encumbrances of record in favor parties not constituting Lin Affiliates (as that term is defined in Section 8). or IID.

7. Interest in Echo Creek Ranch. Prior to the closing AEM shall transfer and assign to IID a portion of its interest in Echo Creek Ranch, a Utah limited partnership, equal to thirty percent (30%) of AEM's total interest therein(i.e., a ten percent (10%) interest in Echo Creek Ranch); provided all of the interest so transferred shall be an interest as a limited partner in Echo Creek Ranch.

8. Cancellation of Debt. As of the Closing Date, all sums owing by ICE, AEM, or Po and Beatrice Chang to IID or a "Lin Affiliate" shall be cancelled and forgiven. For purposes of this Agreement the following, and each of them shall constitute "Lin Affiliates":

(a) Ming Cheng Lin, Hsiun Mei Yen Lin, Tsu-Yen Lin, Wan-Cien Lin, Tsu-Yu Lin, C-H-Lin, T.Y. Lin, Lily Ngan;

(b) Any brother or sister of the persons referred to in (a) above;

(c) Any spouse of the persons referred to in (a) or (b);

(d) Any ancestor or descendent of any of the persons referred to in (a), (b) or (c);

(e) Any trust for the benefit of, any corporation the shares of which are owned by, or any partnership (whether general or limited) or similar unincorporated entity any interest in which is owned by: any person described in (a)-(d) above or any entity described in this subsection.

Lin warrants that no obligation owing to IID or a Lin Affiliate had been transferred assigned, pledged or otherwise alienated.

9. Homestead. The parties shall continue to own their current interest in Homestead Associates provided that Po Chang shall continue to manage the day to day operations of such partnership and Lin hereby consents to such day to day operation by Chang. ~~Prior to Closing a management agreement evidencing the foregoing shall be entered into by Homestead Associates and Chang.~~ In the event future capital is required to operate Homestead Associates, the parties shall provide the same in proportion with their respective ownership.

10. Soldier's Summit. Prior to the Closing Lin shall cause an irrevocable and nonterminable agreement to be entered into between Soldier's Summit Development Company and Chang the term of which shall be thirty (30) years pursuant to which Chang shall be paid a consulting fee equal to two percent (2%) of the gross

~~Prior to Closing a management~~ Chang shall attempt to negotiate a management agreement regarding this property with Jim and Sam Lai. Lin agrees to enter into any such agreement acceptable to Jim and Sam Lai.

Lin agrees to compensate Chang for any reduction in value of Chang's 9 percent interest in Soldier Summit Development Company resulting from any debt owed by ACD to IID prior to closing.

--> Chang shall agree reasonably to consult with Lin regarding the engineering, planning, and development of the Soldier Summit project as requested by Lin.

sales price of the real property owned by said Partnership which shall be secured by the real property.

11. Closing. The consummation of the transactions contemplated by this Agreement is referred to herein as the "Closing." The Closing shall occur on March 1, 1982 (the "Closing Date"). Prior to the Closing the matters set forth in Sections 6-10 above shall have been accomplished; provided that the completion of such items is specifically enforceable and is not a condition to Closing. At the Closing the shares of AEM held by IID shall be distributed to Chang in full redemption of all shares of IID owned by Chang. At the Closing Chang shall assign to ~~IID~~ all of his interest as a partner in Log Haven Associates and Lin shall assign to Chang all of his interest as a partner in International Property Management. Such assignment shall be handled so as to minimize adverse tax consequences to the parties, such as through an exchange.
(Lin or IID)

12. Operating Deficits. Lin shall pay to IID, AEM, ACD, ~~ICE~~, ~~HOMESTEAD ASSOCIATES~~, and LOG HAVEN ASSOCIATES as of the date of this Agreement and shall continue to pay to such entities through the Closing all amounts necessary to discharge obligations of such entities now due or falling due during such period and to meet all operating costs and expenses not discharged out of current operating revenue; provided the parties shall each pay their pro rata share of the obligations and expenses of Homestead Associates from and after January 1, 1982.

13. Intent. The parties intend that the distribution of shares in ICE and AEM to Chang in total redemption of his shares in IID shall constitute a tax free corporate division within the provisions of Section 355 of the Internal Revenue Code of 1954, as amended. The transactions contemplated by this Agreement shall to the fullest extent possible be consummated and documented in a manner that qualifies for such treatment.

14. Remedies for Violations Hereof. Each of the parties shall have, in the event of a violation of any term or covenant of this Agreement by any other party, all remedies available in law or in equity, including but not limited to specific performance of this Agreement, in which the parties and subject matter are unique.

15. Mutual Releases. As of the Closing Date Lin and the Lin Affiliates (and the entities to be owned or partially owned by Lin or Lin Affiliates after the closing) on the one hand and Chang (and the entities to be owned or partially owned by Chang) on the other hand do release and forever discharge each of the others of, from and against any and all claims, demands, causes of action, obligations, damages and liabilities of any nature whatsoever, whether or not now known, suspected, or claimed, which they and each of them ever had, now has, or may hereafter have, or claim to have against the others, or any of them, based upon facts in existence as of the closing date arising out of, or in any manner connected with the Businesses described in the Recitals, or any transaction in which they have engaged (the "Released Matters"), provided, however, that the foregoing release shall not apply to obligations specifically set forth in this Agreement or in the partnership agreements of Homestead Associates, Soldier Summit Development Company, Echo Creek Ranch and/or Logan Plaza Associates.

16. Assumption of Liability by Lin. Lin assumes and agrees to hold Chang harmless from each and every liability and

All debts incurred by Soldier Summit Development Company from following March 1, 1982 shall be borne by the partners (including Chang) in the proportion of their partnership interest. Chang shall not be responsible for, and Lin shall pay, all debts incurred by or on behalf

—> including, but not limited to the $75,000.00 line of credit at Commercial Security Bank and the $100,000.00 line of credit at Utah First Bank. Chang shall exercise his best efforts to secure Lin's release of liability with respect to the Utah First Bank line of credit at the earliest time and shall not increase the amount of said line of credit beyond $100,000.00 until IID and Mr. Lin's guaranty are released.

obligation of IID and ACD in existence at or arising after the Closing Date; provided that this provision shall not be construed as creating any right in or obligation to a third party.

17. Assumption of Liability by Chang. Chang assumes and agrees to hold Lin harmless from each and every liability and obligation of ICE and AEM in existence at or arising after the Closing Date provided that this provision shall not be construed as creating any right in or obligation to a third party.

18. Indemnification by Lin. Lin hereby covenants, promises and agrees to indemnify, defend and hold Chang and its affiliates harmless from and against any and all claims, demands, suits, causes of action, proceedings, judgment, losses, and liabilities, including reasonable counsel fees incurred in litigation or otherwise assessed, incurred or sustained by or against Chang with respect to or arising out of any of the Released Matters, any liability, loss or expense of IID or ACD arising after the Closing Date and any liability described in Section 16. (as to which Chang has

19. Indemnification by Chang. Chang hereby covenants, promises and agrees to indemnify, defend and hold Lin and each Lin Affiliate from and against any and all claims, demands, suits, causes of action, proceedings, judgments, and liabilities, including reasonable counsel fees incurred in litigation or otherwise assessed, incurred or sustained by or against Lin with respect to or arising out of any of the Released Matters, any liability loss or expense of AEM arising after the Closing Date and any liability described in Section 17, (as to which Lin has been released

20. Survival of Indemnification. The foregoing indemnifications, covenants and promises shall survive the execution of this Agreement and the Closing Date.

21. Applicable Law. This Agreement has been made and executed in the State of Utah and shall be construed in accordance with and governed by the laws of the State of Utah except that its choice of laws rules shall not be applied.

22. Binding Effect Upon Successors. This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, successors, legal representatives and assigns.

23. Integration. This Agreement constitutes the entire agreement among the parties pertaining to the subject matter hereof, and supersedes all prior agreements and understandings pertaining thereto. No covenant, representation or condition not expressed in this Agreement shall affect or be deemed to interpret, change or restrict the express provisions hereof. The failure of any party to inspect the documents referred to herein constitutes a waiver of any objection, contention or claim that may be based upon such an inspection.

24. Lease. Lin and IID agree at the Closing to enter into a lease with ICE covering the space presently occupied by ICE and Flower Gallery in the Broadway Building having the following fundamental terms: (1) the term of said lease shall be 10 years following the Closing, (2) rent shall be $1,000.00 per month payable in advance, (3) the lease shall be terminable by ICE upon 60 days notice, but shall not be terminable by the landlord, (4) ICE shall be responsible for utilities and landlord shall be

a lease agreement embodying the foregoing terms and covering the leased premises.

(other than for the contents of the building owned by Chang's and/or ICE)

responsible for all insurance, taxes, and other expenses relating to such space. (5) Landlord shall forgive the first ten (10) months' rent under said lease. At the Closing, the parties shall execute ~~a~~ [illegible] real property

IN WITNESS WHEREOF, this Agreement has been executed as of the day and year first above written.

Ming Cheng Lin 2/6 82

MING CHENG LIN (Date)

Hsiun Mei Yen Lin 2/6 82

HSIUN MEI YEN LIN (Date)

TSU-YEN LIN
WAN-CIEN LIN
TSU-YU LIN

Ming Cheng Lin 2/6 82

By MING CHENG LIN, Agent and Trustee

Hsiun Mei Yen Lin 2/6 82

HSIUN MEI YEN LIN, Agent and Trustee

P. Cheng Chang 2/8/82

2/5/82

PO CHENG CHANG (Date)

Beatrice H. Chang 2/8/82

2/5/82

BEATRICE H. CHANG (Date)

MAX S. CHANG
MELISSA S. CHANG

P. Cheng Chang 2/8/82

By PO CHENG CHANG, Agent and Trustee

Beatrice H. Chang 2/8/82

2/5/82

BEATRICE H. CHANG, Agent and Trustee

25. Daiei Trading. Services heretofore performed by ICE for Daiei Trading Co. Ltd. will hereafter be performed by Lin or his designated affiliate. Chang and ICE hereby transfer and assign to Lin all rights and authority to act as exclusive agent for Daiei Trading Co. Ltd and the goods it distributes presently, and agree to execute and deliver to Lin such further documents required to accomplish this transfer and assignment; provided, however, that Chang's and ICE's obligations hereunder shall be subject to the consent and agreement of the manufacturer(s) concerned.

26. Cancellation of Debt. Chang and ICE agree to forgive and cancel the present debt of Daiei Trading Co., Ltd. to ICE. Lin, for himself and on behalf of Log Haven Associates, agrees to forgive and cancel the present debt of ICE to ~~Lin~~ Associates.

Changs agree not to take any action to dissuade or discourage said manufacturer(s) from doing business with Daiei Trading Co. Ltd. nor to persuade such manufacturer(s) to do business with ICE

FIRST AMENDMENT

TO

CERTIFICATE AND AGREEMENT

OF

LIMITED PARTNERSHIP

OF

SOLDIER SUMMIT DEVELOPMENT

We, the undersigned, previously formed a Limited Partnership (the "Partnership") by filing a Certificate and Agreement of Limited Partnership (the "Partnership Agreement") with the clerk of Salt Lake County, State of Utah on November 2, 1978, as File No. 13249, and now desire to amend such Certificate and Agreement as follows:

1. The opening paragraph setting forth the names of the partners is hereby amended to state as follows:

> "THIS CERTIFICATE AND AGREEMENT OF LIMITED PARTNERSHIP (the "Agreement") is entered into by and among AMERICAN CITY DEVELOPMENT CORPORATION, a Utah corporation (referred to herein as the "General Partner"), and JAY L. MURPHY, PO CHENG CHANG, and BEATRICE H. CHANG (referred to herein as the "Limited Partners") for the purpose of forming a limited partnership (the "Partnership") which shall be subject to the following terms and conditions:"

2. Paragraph 4 is hereby amended to state as follows:

> "4. Principal Place of Business: The principal place of business of the Partnership shall be at 2059 East 3900 South, Suite 101, Salt Lake City, Utah 84117, or at such other place as the General Partner may designate from time to time by written notice to the Limited Partners. The General Partner may, at his discretion, also establish additional places of business from time to time."

3. Paragraph 5 is hereby amended to state as follows:

> "5. Partners: The name and residence address (or in the case of a partnership or corporation, its principal place of business) of the General Partner is:

NAME	ADDRESS
American City Development Corporation	2059 East 3900 South Suite 101 Salt Lake City, UT 84117

The name and residence address (or in the case of a partnership or corporation, its principal place of business) of the Limited Partner is:

NAME	ADDRESS
Jay L. Murphy	797 17th Avenue Salt Lake City, UT 84103
Po Cheng Chang	1360 Beneficial Life Tower 36 South State Street Salt Lake City, UT 84111
Beatrice H. Chang	1360 Beneficial Life Tower 36 South State Street Salt Lake City, UT 84111

4. Subparagraph 7.2 is hereby amended to state as follows:

"7.2 The respective interests of the Partners in the capital and the profits and losses of the Partnership shall be as follows:

PARTNER	CASH CONTRIBUTION	PERCENTAGE INTEREST
American City Development Corporation	$270,000.00	81.00
Jay L. Murphy	30,000.00	10.00
Po Cheng Chang	250.00	4.50
Beatrice H. Chang	250.00	4.50
TOTAL	$300,500.00	100.00"

5. Notwithstanding any other provision of the Partnership Agreement, any and all debts, obligations, liabilities, bills, costs or expenses of the Partnership (whether known or unknown) incurred or arising prior to March 1, 1982 and interest accruing thereon after March 1, 1982 (the "Pre-Existing Obligations") shall be borne and discharged by the General Partner and Jay L. Murphy in the ratio that their respective percentage interests bear to one another. All allocations of profit and loss and distributions shall be computed as though the Pre-Existing Obligations were the individual obligations of the General Partner and Jay L. Murphy in such proportions, and the amounts that would otherwise be distributed to the General Partner and Jay L. Murphy shall be used to pay the Pre-Existing obligations. To the extent that the amounts allocated to the General Partner and Jay L. Murphy are not sufficient to discharge the Pre-Existing obligations, the General Partner and Jay L. Murphy shall contribute to the Partnership (without affecting the rights of the other Partners) sufficient cash to discharge the Pre-Existing obligations as they fall due. Except to the extent set forth above, the Partners shall each bear their pro-rata

share of any liabilities, obligations, debts or similar items arising on or after March 1, 1982.

6. Subparagraph 10.3 is hereby amended to state as follows:

"10.3 Allocations of Distributions. All distributions made pursuant to this Section 10 shall be allocatec as follows:

(a) The Partners shall first receive an amount equal to their total cash capital contributions to the Partnership up to that time as reduced by all cash contributions theretofore made to them pursuant to this Agreement; except that for purposes of this Subsection (a) it shall be assumed that the initial cash contribution of Po Cheng Chang was $13,500.00 and that the initial cash contribution of Beatrice H. Chang was $13,500.00.

(b) The amount of any distributions in excess of the amounts distributed pursuant to Subsection (a) above shall be allocated among the Partners in proportion to their respective interests in the Capital and Profits and Losses of the Partnership."

7. Except as specifically amended hereby, the provisions of the above-described Certificate and Agreement of Limited Partnership of Soldier Summit Development shall remain in full force and effect.

EXECUTED as of the date first set forth above.

GENERAL PARTNER:

AMERICAN CITY DEVELOPMENT CORPORATION

ATTEST:

By _____
Its: _____

LIMITED PARTNERS:

_____ March 1, 1982
PO CHENG CHANG (date)

_____ March 1, 19
BEATRICE H. CHANG (date)

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the 1st day of March, 1982, personally appeared before me Hui-Chung Henry Yen, who being by me duly sworn did say that he is the President of AMERICAN CITY DEVELOPMENT CORPORATION and the foregoing document was signed in behalf of said corporation by authority of a resolution of its board of directors and said Hui-Chung Henry Yen acknowledged to me that said corporation executed the same.

Steven D. Shuman
NOTARY PUBLIC, residing in
Salt Lake City, Utah

My commission expires:

10/1/85

STATE OF UTAH)
ss.
COUNTY OF SALT LAKE)

On this 1st day of April, 1982, personally appeared before me PO CHENG CHANG, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

NOTARY PUBLIC, residing in
Salt Lake City, Utah

My commission expires:
4/25/84

STATE OF UTAH)
ss.
COUNTY OF SALT LAKE)

On this 1st day of April, 1982, personally appeared before me BEATRICE H. CHANG, the signer of the foregoing instrument, who duly acknowledged to me that she executed the same.

NOTARY PUBLIC, residing in
Salt Lake City, Utah

My commission expires:
4/25/84

A. Water Report

1. One hundred forty four acre feet of water is currently available for use. Thirty eight acre feet has been deeded to county. Current plans call for the water to be used to develope:

   500 recreational lots
   80 high density lots
   1 Motel

2. Water rights can be pruchased for future higher density developments.

3. Plans for the water system have a pickup station where owners can obtain clean water from a holding tank. This sysem will be designed and implemented by Uintex.

4. The water system will be subject to an inspection by the county once it serves more than 15 families.

B. HUD Application

1. Once HUD has approved the development of the project; state, county and city offices are expected to follow suit.

2. To get approval from HUD the following information and improvements are needed.

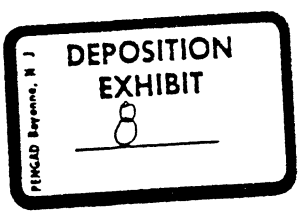
   a. Financial disclosures
   b. Improvements

      1. Roads need to be rough cut and graveled in certain areas.
      2. Water culverts need to be installed
      3. Water stations need to be made available to the owners.
      4. Water needs to be deeded to the water district.
      5. A title report needs to be prepared within 20 days of applications.

C. Owners Association

1. The articles of Incorporation of the Association should have a provision for allowing future developed properties to join the membership.

2. It should also allow the management of the association to be transferred to the owners after approximately 25% of the lots have been sold.



BUSINESS PLAN
SOLDIER SUMMIT DEVELOPMENT
MARCH 11, 1985

Executive Summary

In reference to maximizing the value of the property in Soldier Summit, the current mode of development may not have made the best use of the land resources. We recommend that a master plan be considered for the whole project. Plat C should be developed to (1) test the market, (2) to raise some fund for the master plan and (3) to recover the investment. A business plan is drafted as a starting point for discussion: Short term and long term goals are identified. Market research needs are discussed. Production activities for 1985 are outlined. Marketing tasks are described. A cash flow projection is tabulated. And finally work schedule is designed.

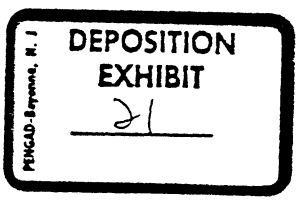
1. Concept

The concept of this project is to provide well planned premier recreation property. If this concept is also to produce the maximum amount of profit with the available land resources, we need to re-evaluate whether the currently approved Plats C and D is the best way to go. In view of the outstanding physcial assets of the project it is advisable to look into other possibilities at this early stage of the development before we proceed to complete Plats C and D.

The present development concept - Plats C and D as approved is basically the same as that of Echo Creek Ranch: subdivide and sell lots. I believe that Soldier Summit has features far superior than that of Echo Creek Ranch. We may not have made the best use of the land resources under Plat C/D subdivision.

The greatest strength of this project is the fact that (1) it is under one ownership and (2) the size is large and there is enough latitude for large scale planning. Total acres of the project are comparable to the combined area of Park City and Park West. There is opportunity to plan the project in the style of Aspen, Colorado, or Irvine, California. Other assets of Soldier Summit Development include:

Seclusion of property (by railroad) from public.
Proximity to Scofield Reservoir.
Neighboring proposed Indian Head Reservoir.



Land for summer resort development
Slopes for ski development, ranging from 20% to 30%.
Relative easy access through highway 6 or railroad.
Snowmobiling already popular in the area.

Exhibit A shows some features of other ski resorts in Utah. Compare them with Soldier Summit's and you will find that Soldier Summit Development offers a truely all-season recreation: boating, fishing, golfing, hiking, skiing, snowmobiling.

2. Objectives

Soldier Summit Development has both long term and short term objectives. The short term objective is to recover the investment and become a self-sustained economic entity by the end of 1987. The long term goal of the development is to achieve a 30-to-300 million dollar company by 1995.

The short term development goal can be sequentially accomplished in three phases:

(1) Phase 1 (1985): Develop Plat C and sell 15 lots. Complete master plan.

(2) Phase 2 (1986): Sell 15 lots. Get approval of master plan.

(3) Pahse 3 (1987): Sell 15 lots. Design facilities under master plan. Estimate costs.

The revenue from the sales of Plats C should be sufficient to recover owner's investment and have left-over for the master planning. The goal should be at least 2 million dollars.

If the short term goals are completd as scheduled, the rest of the work is to carry out the master plan. We expect to redo Plat D as a planned unit development. Plat D and area west of it will be reserved for resorts where a resident would step out of his/her door and ski.

We expect that the area in Wasatch County will be reserved for golf course recreation homes or lake front vacation homes.

3. Market Analysis

We will engage a local reserach institution to perform a preliminary market analysis. As needs develop, we will then hire a national company to perform a more precise study. The market segment has to be the upper income class or corporations. The market analysis will be performed in 1985 before we formulate our master plan.

We know that Utah's ski industry is growing. In 1983, there were 2.4 million skier visits; and the in-state visitors and the out-of-state visitors roughly split the total. A Utah visitor would spend $19 per day versus $74 per day for out-of-state visitors. In 1983, total revenue of the ski industry was 110 million dollars, of which the out-of-state skiers contributed 80%. It is believe that ski dollars has increased considerably since 1983. Most of the ski resorts are overflowing with skiers.

Profiles of buyers at Echo Creek Ranch, Jeremy Ranch, Park City's Resort Center (see Exhibit B) and other developments should be consulted. We need to determine our market segment: upper income class or middle income class, Utah buyers or out-of-state buyers.

We believe that the lots in Plat C should be sold at 50,000 apiece with 10,000 downpayment. The tasks of market analysis for 1985 are:

301 Seek and engage consultants
302 Market analysis reports

4. Production

We believe that quality of development is essential. We must establish our credibility as a quality developer to gain the trust of county officials.

We will request for an extention of the road improvement of Plat C until 1986, synchronizing with the sale volume. We will finish about half of the road improvement in 1985. The water pick-up station will be finished in 1985.

Producing the master plan will be an important undertaking for 1985. The tasks for 1985 are:

401 Water pick-up station
402 Road improvement, 1st mile
403 Master plan, conceptual
404 Coordination with counties
405 Master plan, preliminary

5. Marketing

For 1985, our goal is to sell 15 lots in Plat C. We will concentrate our effort on the upper income segment in Utah and other major metropolis. The tasks identified include:

Brochures
Recruit saleman

Advertising
Strategic planning

6. Organization

7. Cash Flow Projection for 1985

SCOFIELD SUMMIT ESTATES

A Marketing Study

for

International Investment and Development, Inc.

January 1986

by

Thomas E. Kasper

The River Oaks Corporation

TABLE OF CONTENTS

EXECUTIVE SUMMARY

1. Market conditions indicate that there is a substantial amount of risk in the development of any recreational land. This is highlighted by the subjective nature of the buying process and the lack of demand for recreational land at this time.

2. The absorption for this development will not be quick. Recreational land is no longer fueled by the speculation buyer, therefore a rapid sellout is not reasonable to expect. In the best case scenario 20-30 lots per year will be sold in the 88 lot phase of development.

3. If developed, an important key to success for this development will be to create a very believeable image of a financially secure development company. This will be accomplished principally in the way the property is presented and promoted.

4. There will be two principal target markets for the lots. The counties of Utah, Carbon, Emery, Wasatch and Sanpete will be the major target markets. The Wasatch Front cities will be a secondary target market, but will not contribute as much in sales as the surrounding counties. Out of state marketing will be of very limited significance.

5. The development of a marketing program to create "family estates" will be important. Multiple lot purchases by the extended family will prove desirable to many targeted buyers. A family purchase program will need to be part of the marketing plan.

6. The marketing effort should not be perceived as a "slick" or

for the perceived costs of a high powered marketing effort.

7. The sales and brokerage personnel will be a critical key in achieving steady sales. Local brokers as well as onsite sales people should be utilized. For continued motivation, adequate commissions should be provided as well as a unique bonus program to generate continued enthusiasm.

8. A substantial community center will be necessary and useful. It will provide the community its own identity and at the same time become a gathering place for owners to rely on for messages, emergencies etc. An added benefit will be provided as the community center will double as an attractive sales office. This will be important in establishing the identity of the community and the stability of the developer.

9. The development must create an identity of its' own and avoid association with Soldiers Summit. A community name should be created with sub-developments which reference the larger community. Example: The Summit of Lost Creek; The Woodlands of Lost Creek; The Crested Fork of Lost Creek, etc. A name has yet to be finalized.

10. The property has many of the natural elements needed to attract the recreational buyer. However the lack of a stream on the property and the lack of immediate proximity to Scofield Lake will detract from the desirability to some buyers. The property has the minimum acceptable requirements of water, access, electricity and sewage. The septic tank disclaimer from the county will have to be resolved prior to marketing.

11. The most difficult problem posed by this project is to establish the pricing. Because of the lack of immediate comparables, the pricing will drift to what the market will bear. The price range that has been developed is from $13,000 to $$37,000, or an average of approximately $20,000 per lot (See Exhibit 2). Prices can be quickly changed as demand dictates.

12. Financing will be extremely important to the buyer. It should be easy to buy at Scofield Summit. A 10-15% downpayment and a 8.75%, 30 year amortization with a 15 year call, will allow the prospective buyers to afford monthly payments of $135-$175.

13. Promotional events should become an integral part of the marketing effort. Snowmobiling, cross country skiing events should be promoted during the winter months and in the summer month promotions of fishing, camping and other outdoor recreational events should be attempted.

14. Consideration should be given to the establishment of a recreational vehicle campground. This would serve as a staging area for the overall development and if successful will turn into a strong cash generator.

MARKET RESEARCH

There have been a number of recreational land developments which, in the past, have not met with success in the state of Utah. The recreational land boom lost much of its success in the 1979-82 era of economic adjustment. Indeed all real estate underwent a major transformation. That transformation seems to be principally complete and the days of rapid speculation in nearly all types of real estate are for the most part over. Early recreational projects were fueled by speculation. In today's more conservative market, the speculative buyer is no longer creating unjustified demand.

In a county by county search of new recreational land developments conducted in November 1985, there appears to be little new recreational land planned for development in Utah for 1986-1987. In checking Salt Lake, Sanpete, Carbon, Utah, Emery, Sevier, Summit, and Wasatch counties, there appears to be only three other developments of recreational land to be developed in the near future.

In Sevier County, there will be a 318 lot subdivision, near Salina, started in 1986. The first phase of Mount Air Oaks, over 1600 acres, will be approximately 80 lots. They will be five acres in size and have been approved for cabins with septic tanks and wells. The developers have installed a water pickup station and oiled roads will provide year round access. Having not visited the site, I am advised that it features desirable natural landscaping of aspen and pine and a very small Scootum Par reservoir for fishing. The developers will sell the lots for $6,000 to $15,000 with 10% down, 15 year financing.

In Summit County, there has been approved a 2500 acre site near Tollgate Canyon (near Park City). This site will be developed as a PUD and will require a substantial amount of work before any physical development can begin. The developers will be required to put in a complete water system for the development. It seems doubtful that this development will occur before 1987. There will be substantial front end cost to this development.

Also in Summit County there will be a major new recreational development by a Dutch group. Known as the Mayflower development, this 5400 acre project will be a multi faceted project which will boast a year round recreational opportunity. The project will range from single family lots to multifamily condominiums and feature a complete commercial development. The site is unique as it will front on the new Jordanelle dam now under construction. The project will be able to offer every type of recreational activity as it has access to the Deer Valley skiing areas and all the activities that Park City has to offer. Development plans remain uncertain as the developers are reportedly very concerned with the overall marketability of this major recreational development. Indeed the present condition of the Park City area and its continuing deterioration should cause any developer second thoughts prior to embarking on a major development of this type. No prices are available at this time, however construction of the infrastructure is to begin this summer and marketing of the commercial pads is expected to commence fall of 1986. Final configuration of the development

and its various aspects should take place in 1987.

There are two existing recreational land areas which should be briefly reviewed. Both Summit County and East Canyon resort have had lackluster performance over the past few years relative to the absorption of the recreational land available.

There presently exists an substantial amount of recreational land available in Summit County. This has been a result of ambitious development aimed at the Wasatch Front buyer. There is simply too much product to be absorbed by the urbanized population of Salt Lake City, Ogden and Provo. The target market may well be unwilling to purchase land "fee simple" when there are already so many attractive alternatives available such as timeshare rentals, condominiums, rental cabins etc. to be used.

The East Canyon Resort, near Morgan, is a large 10,000 acre development which was started over four years ago. It has not enjoyed success and is presently attempting to regroup and re-capitalize to continue its' marketing effort. The development has been sold similar to a time share concept with owners buying a 14 day use privilege for $17,000. The annual fee is $245, which enables owners to enjoy condominiums, campsites, summer and winter sports. The East Canyon Resort has the capacity to accommodate 10,000 buyers, to date they have sold 2,000. This project will not be a directly competing development with Scofield Summit, as the buyer profiles are entirely different. The lack of success of this project may be attributable to the down fall of the time share industry specifically the decline of

absorption problems Summit County has for recreational property. There may be just too many already developed recreational alternatives for the Wasatch Front buyer/user to enjoy which require much less time and effort to become involved with.

In the immediate area of Scofield Summit, there is only one small development of recreational lots available. The Mountain Home subdivision on the west side of Scofield lake is approximately 10 years old and has only a few lots currently available. They are small 1/2 acre lots which are selling for $9,000-$11,000 with no terms available. This development will not be a serious competitive factor.

Overall, from a product standpoint, there will not be a substantial amount of competing projects to be concerned with. However, this primarily reflects the overall condition of the market. Market demand is a a low ebb for recreational type property and any development should be undertaken with caution and a long term commitment.

THE MARKETING PLAN

There exists six basic functions in the marketing of any project. They are: 1) Identifying the primary and secondary markets; 2) Creating the advertising and merchandising to attract sufficient prospects to the property; 3) Qualifying the prospect; 4) Demonstrating the property and its potential benefit to the buyer; 5) Closing the sale. 6) Followup marketing with existing buyers.

The most important aspect of the marketing plan is first to identify the markets which are most likely to respond to the marketing program and then to create an advertising campaign which will illicit a response from the targeted buyer.

There exists two primary markets and a limited number of secondary target markets for Scofield Summit Estates. These various markets will be isolated and examined and then blended into an overall marketing plan.

One of the primary markets that this development will appeal to is the existing population of the surrounding counties. Those counties will be Utah, Carbon, Sanpete, Wasatch and Emery. This targeted market has the advantage of knowing the peculiarities of the area better than any other group. This targeted buyer will know for example the impact the weather patterns have upon the area, the best areas for hunting and fishing and how seasonal changes impact outdoor recreational opportunities. They will have a good idea as to the recreational areas which are near the property. They will also have the best subjective feel for the overall desirability of the property.

the four county area is expected to grow slowly at under 2% per year through the year 2000. Historically, strong population growth has not been a particular characteristic of recreational land being absorbed. This is because of the need for the existing population base to have the recreational experience. In this case the growth can only help in the absorption of the project as new growth will provide new prospects.

The five county area, with the exception of the Provo area is comprised of a workforce which is predominantly more blue collar than professional. This blue collar worker has historically had a much higher involvement with outdoor recreational activities such as fishing and hunting. As a target market they will be responsive to the concept of owning their own recreational acreage. It is important to note that this buyer is urbanized in smaller cities throughout the immediate counties. Their principal real estate holdings are in their homes. They do not own large acreage outside of their principal dwelling. A development which provides an easy access of ownership will allow this target buyer to become his own "land baron". This will have substantial appeal to ones status and identity. A development of recreational property which is subjectively attractive to this buyer and provides ease of purchase will have demand from this market segment.

It should be noted, however, that Carbon and Emery counties have a very unsteady economy. The coal mining industry has had a number of layoffs and strikes as the demand for Utah coal

income of prospects from these counties.

It will not be unusual for this five county primary target market to make multiple purchases of recreational land. In Utah, the family unit is much more than father, mother and children. Often is the case of extended families which include grandparents, uncles, aunts and cousins. It is anticipated that this extended family unit will make a purchase of contiguous lots thus creating a "family retreat" or a "family estate". This should be encouraged and marketed by offering a discount to family members if a purchase of a lot is made within a certain period of time. A discount of 10% to 15% will encourage multi-lot purchases by the same family group. The establishment of a "family recreational estate" which can be used by any of the family members will have great appeal. On a practical level it will also spread the responsiblity of ownership and speed the overall development of permanent mountain homes, as the financial burden can be shared by two or more family groups within a family.

The Wasatch Front buyer will be a secondary market for the project. The cities of Salt Lake, Ogden and Provo comprise the bulk of population for the state. Because of the distance involved, the Ogden market and northward will not be actively cultivated. The Salt Lake City area will provide prospects, simply because of the population base there. However, the cost to cultivate buyers from Salt Lake City on a non-selective basis will prove to be too expensive for the project to bear. The Salt

information that will pre-qualify him to be interested in owning recreational land. This can be done by obtaining lists from the state which show fishing and hunting licensees and other lists which detail ownership of recreational vehicles and mobile homes. At very little expense, a substantial prospect list of recreational users can be obtained from the Salt Lake county area. This type of approach to pre-select prospects from the Salt Lake county area project will prove to be much more cost effective than a blanket advertising and promotion campaign to the Wasatch Front buyer.

This is particularly true when considering the large number of competing recreational options, including mountain lots, that the Salt Lake county user has. In addition to the Summit County and East Canyon areas which have all types of recreational opportunities available, there are all the existing recreational activities available in the developed canyons.

The distance from Salt Lake and subsequent drive time to Scofield Summit will limit the number of prospects from the Salt Lake county area. Because of existing options and the time factor, a broad based marketing approach to Salt Lake county cannot be justified.

The financing of the property will be a critical key to its marketing. The developer must make it extremely easy for he buyer to become involved with ownership at Scofield Summit. This is true because typical sources of real estate lending would not be favorably inclined to participate in the financing of mountain lots at a rate which our target markets could qualify for or afford. A rate of 8-9% annual interest with a 10% down payment

and a 30 year amortization with a 15 year call will make the payments of approximately $135-$175 per month affordable.

The key for success in any development is traffic. People must physically visit the site in sufficient numbers for the selling function to take place. Hence the advertising and promotional elements of a successful marketing program will be devised to stimulate the targeted buyer to visit the site. The creative aspects of the advertising program will have to stimulate the buyer to take his own time and investigate the possibility of owning his own recreational land.

The advertising campaign for the property should be developed jointly by an experienced advertising agency and the marketing broker. Although the potential buyers of this type of property will shun from flashy and slick promotions, the basic ingredients of effective and creative advertising themes cannot be minimized. Therefore it will be necessary to involve the expertise of those who are experienced in the creation of advertising concepts and graphic design. The creative themes once developed, can be used in a variety of different and effective ways.

The most effective type of advertising medias to be used for this development will be direct mail, radio, print medias and signage. From this type advertising effort, it is hopeful that substantial word of mouth will also be generated. As illustrated in Table 2A,B&C, this media mix will prove to be the most cost effective in generating the adequate traffic needed for sales to materialize. As pointed out earlier, the only purpose of the

advertising program is to deliver to the site a prospect who is willing to let a sales person demonstrate the product.

One of the advantages of direct mail is the ability to pinpoint the targeted buyer. Already this researcher has identified available lists of potential recreational land users. Additional lists are available for a very small fee. Direct mail as an advertising form is relatively inexpensive and if properly done can provide substantial traffic to the project. For direct mail to be effective, repetition is critical. For this reason, a continuing emphasis on the direct mail approach is recommended. To reinforce the direct mail program, radio advertising should be used also. This is perhaps the most economical form of reaching a potential buyer and again has the advantage of being tailored to a specific market. The radio stations used will be those principally in the major cities of the surrounding counties. Because of the location and relative size of these markets, radio advertising will prove to be an inexpensive media. Thus it will allow a continuing schedule of exposure to the markets targeted. When combined with the direct mail program, the rate of recognition for the project will be unusually high. The direct mail and radio should be coordinated so that maximum exposure is gained during peak selling seasons which will be May through September. It should be noted, that radio used in the Wasatch Front cities, excepting Provo, will not be cost effective and is not recommended.

The use of print media advertising will be explored and evaluated as it is used. Print media includes magazines,

targeted buyer. The principal purpose of print media advertising will be to give directions to the project and reinforce the direct mail program and the radio. Again, this media should be evaluated and eliminated if it is determined that the direct mail program is sufficient in directing traffic to the project.

One additional source of advertising, which is free, is an effective public relations campaign at the beginning of the marketing of the project. If done properly, substantial recognition can be obtained through well orchestrated press releases and media coordination. The development can be treated as a news item, which for a very short time will attract public attention. A complete public relations campaign should accompany the marketing program.

From Spanish Fork to the development there is a traffic count of approximately 4200 vehicles daily. From the property to the Carbon County line, there are approximately 4170 vehicles per day. One other method of reinforcing all the other types of advertising and promotions will be to use adequate signage that will take advantage of this traffic flow. At the same time, signage will provide the needed directions for prospects to find the property. In addition to the major site sign, there should be three to four signs from Spanish Fork and also Price.

Once people have been stimulated to visit the project, the principal objective of the advertising has been accomplished. Once a prospect has determined to visit the site for an inspection, the site presentation and sales personnel become the critical ingredients for sales.

The one adage that is particularly true in a site presentation is that "you never have a second chance at a first impression." So many campaigns fail because of inadequate preparation and presentation of the sales office and immediate area.

As indicated previously it will be necessary to establish a project sales and community center. This will serve many important functions as it will provide the community with its' own identity. It will allow owners of the property a center for messages and emergencies that may arise. It will also provide the proper showcase for the property to be exhibited and demonstrated to the prospective buyer. Thus the sales office/community center will serve as a multiple use structure and should be planned as such. It should have easy access to and from the highway and give an immediate sense of the development theme and include landscaping. Again the sales office/community center should not be located within Soldiers Summit. Using the existing master plan, a good location for the sales office/community center will be in Area B, just off Highway 6.

As future phases of the development are introduced it may be advantageous to continue to use the same sales office/community center. Thus the establishment of the structure should be considered over the life of the project.

Included in Exhibit 1, are various floorplans of prefabricated log homes. The cost of this type of structure ranges from about $10,000 to $20,000 for the log home package. This does not include the earth work, foundation, septic tank,

structure would cost from $25,000 to $40,000 depending on the size and type of finish required. It is recommended that a structure of this type be used for Scofield Summit Estates as it will create the rustic image that recreational property owners will desire and imagine for their own lots.

The salespeople who are involved with the project will make all the difference. The objective of course is to sell 88 lots. This can be accomplished by limiting the selling function to one or two site salespeople or to expand the sales force and include the existing real estate brokerages in the area.

In some types of projects, it is best to utilize only site salespeople and exclude outside brokerages. This is true when there is strong demand for product. In the case of Scofield Summit Estates it is recommended that both site sales and existing brokerages be used in order to maximize the traffic and ultimate sales volume.

Manning the sales office on a regular schedule will allow the results of the advertising and promotion campaign to be maximized as there will be a sales person there to be continually focused on the project. In order to command the attention to detail required and to make sure that specific marketing programs are carried out, the site salesman will probably need to receive a small monthly salary with the bulk of his income to be derived from commissioned sales.

Perhaps the best arrangement that could be made for the actual sales management of the project would be to involve one of the existing brokerages in the area as the sales agency for the

development. There exists two or three veteran brokerages who have had substantial experience in the selling of all types of land in the area. Most importantly, the local brokerages are familiar with the local populace and have developed these contacts over many years. This cannot be done by advertising.

The property will need to be demonstrated. Successful selling involves the prospect and all of his senses. When the prospect visits the sales office, he should be greeted with a well organized presentation of the property. The best way to do this is with excellent photographs of the property with lots overlaid showing the dimension and location within the larger development. Once the prospect has been sufficiently qualified, the prospect must physically inspect the property. This will entail the selling agent to accompany the prospect to the various lots and to demonstrate the beauty and desirability of the property. To accommodate this, a four wheel vehicle should be made available for this purpose. The time to close a sale is when the emotions are strong and the objections have been eliminated. This will happen most often when the prospect is physically on "his own lot" and imagining his own future cabin.

In order for any sales operation to be successful, adequate compensation must be part of a good marketing program. Because of the relatively small price of the lots and the slow absorption of the lots, the marketing cost for the project will be high. Unfortunately, without adequate compensation to the sales people involved, the motivation to "scour" the countryside for prospective buyers will be substantially diminished. In checking

property, a 6% commission would be adequate motivation. Usually the commission for land of this type is about 10%, but because of the advertising program which will be carried by the developer, a smaller commission structure will be acceptable.

To reward particularly high sales acheivers, an extremely motivating reward would be a premium or gift program for outstanding sales performance. Even though many different brokerages will participate in the selling of Scofield Summit, after the initial "newness" of the project wears off, there will be left a small cadre of sales agents who will consistently produce sales. If a sales motivation program could be designed that would increase sales to allow only a two year sell out, then it would be worth it to reward those acheivers with premiums which would really motivate them. For example, any sales person that sells 20 lots in one year could receive a new four wheel drive vehicle. Other motivational premiums could be vacations, snowmobiles, motorcycles, etc. The premium would be large enough and desirable enough to make the "right" sales person focus his attention on selling lots. The price the premiums is if it can reduce the marketing time of the project one year. A complete premium program such as this could be an important motivational factor for sales people.

From a continuity standpoint, a continued emphasis should be placed on stimulating the existing brokerages in the area. Sales meetings, special presentation luncheons and other types of interactive meetings should be regularly scheduled with brokers in the area to keep them abreast of the development's progress

and hopefully to keep their interest in the project.

One additional area of marketing the overall project will be to create events. Year round activities should be developed, and the most promising should be developed into a full blown promotional events. This would include snowmobiling races, hunting contests, fishing contests, wilderness events. The purpose of these events will be to establish the development and be generators of additional traffic and exposure.

Promotions such as these will be expensive and should only be considered relative to the development activity which is definitely planned.

RECREATIONAL VEHICLE DEVELOPMENT

The master development of all 4500 acres will, if developed, take a numbers of years to accomplish. As indicated previously, the development of the property into a year round facility would be the optimum situation. That possibility will be governed primarily by market forces and the completed development plan utilized. If the year round operation of the property is desired, then some consideration to the development of a recreational vehicle should be considered.

RV parks can be extremely profitable. In this case if the demand can be demonstrated for an RV camp on Highway 6, then such a development could provide two important features to the marketing of the various developments of Scofield Summit. It could 1) provide a substantial cash flow for the developer; and 2) provide a staging area for visitors to the property.

RV parks can be a high risk venture and certainly much more study should be conducted to see if there is enough traffic to offset the risk, however as the following pro forma shows, they are strong cash generators.

Proforma
100 Unit RV Park

Development Costs $5,000 per pad.....	$500,000
Loan (75% LTV).....	375,000
Equity Required.....	$125,000

Annual Operational Proforma

Assumptions: $10.50 per vehicle per night and expenses of 20%. A permanent loan of $390,000, 25 year term, 12% interest.

Occupancy	20%	30%	40%	50%	60%
Income	$75,600	$113,400	$151,200	$189,000	$226,800
Expenses	15,120	22,680	30,200	37,800	45,360
NOI	$60,480	$ 90,720	$120,960	$151,200	$181,440
Debt Service	49,290	49,290	49,290	49,290	49,290
Net Income	$11,190	$41,430	$71,670	$101,910	$132,150

The information used to construct these proformas has been taken from recently developed RV parks within Utah and is reliable and accurate. However, it is not within the scope of this report to recommend the feasibility of developing an RV park, only that this type of development should be given more research, if the property is developed.

TABLE 1

UTAH BASELINE PROVISIONAL POPULATION PROJECTION
1980-2010

DECEMBER 1984

COUNTY	1980	1985	1990	2000	2010	Annu Cha
Box Elder	33500	36700	42350	50000	60000	1.96
Cache	57700	67500	76400	87250	100600	1.87
Rich	2150	2300	2450	2650	3000	1.12
Davis	147900	172000	217500	285300	346000	2.87
Morgan	4950	6200	8900	16100	24400	5.46
Salt Lake	624500	691800	786400	912600	1099000	1.90
Tooele	26200	30000	39000	52750	68300	3.25
Weber	145400	158200	178400	223950	265300	2.02
Summit	10350	12550	15100	19600	26300	3.16
Utah	220400	249600	284500	295800	338800	1.44
Wasatch	8650	9150	10100	11500	14000	1.62
Juab	5550	6900	6900	7800	9300	1.74
Millard	9050	17700	15400	16300	19000	2.50
Piute	1350	1650	1800	1900	2000	1.32
Sanpete	14750	18000	20700	21500	24700	1.73
Sevier	14850	17050	20300	21700	27000	2.01
Wayne	1950	2300	2500	2800	3000	1.45
Beaver	4400	5100	5150	5350	5900	.98
Garfield	3700	4050	4100	4250	4650	.76
Iron	17450	19350	21400	25600	31400	1.98
Kane	4050	4400	4700	5500	6800	1.74
Wash.	26450	32700	37450	46500	58750	2.70
Daggett	750	850	850	900	900	.79
Duchesne	12650	14750	16900	18600	21450	1.78
Uintah	20700	25100	28950	32200	37900	2.04
Carbon	22350	25100	27800	31200	39300	1.90
Emery	11650	13400	13700	14500	15700	1.00
Grand	8250	7800	8050	8800	10000	.64
San Juan	12400	13400	14650	15800	17600	1.17
Total	1474000	1665600	1912400	2238700	2681050	1.89

Estimates and projections as of July 1 each yea

Source: Universtiy of Utah
Department of Business and Economic Review

Table 2A

Preliminary Marketing Budget for Scofield Summit

FIRST YEAR

	JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC	TOTAL
Sales Est	0	0	0	4	5	6	4	4	4	3	0	0	30
ADVERTISING													
Print media				1000	1000	1000	500	500	500	500	0	0	$5,000
Radio				1000	1500	1000	750	750	750	500			$6,250
Direct Mail				3500	3500	3500	3500	3500					$17,500
TV													$0
Promotions					2500								$2,500
Brochure			2500										$2,500
Signage			4500										$4,500
Sales Office			5500										$5,500
Postage					25	25	25	25	25	25	25	25	$200
Printing			1500										$1,500
Graphics			2500										$2,500
													$0
													$0
MODEL HOME EXPENSE													$0
													$0
Furniture Lease				350	350	350	350	350	350	350	350	350	$350
Rent/Lease				450	450	450	450	450	450	450	450	450	$4,050
Utilities				100	100	100	100	100	100	100	100	100	$900
Telephone				350	150	150	150	150	150	150	150	150	$1,550
Cleaning				75	75	75	75	75	75	75	75	75	$675
Maintenance				50	50	50	50	50	50	50	50	50	$450
Supplies				25	25		25		25		25		$125
													$0
SALARIES &													$0
COMMISSIONS													$0
													$0
Salesman			1000	1000	1000	1000	1000	1000	1000	1000	1000		$9,000
Commission	0	0	0	4800	6000	7200	4800	4800	4800	3600		0	$36,000
TOTAL	0	0	17500	12700	16725	14900	11775	11750	8275	6800	2225	1200	$101,050

Avg Price
$20,000
Commission
6.00%

Total Sales: $600,000

Marketing % Sales: 16.84%

KM002566

Table 2B

Preliminary Marketing Budget for Scofield Summit

SECOND YEAR

	JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC	TOTAL
Sales Est	0	0	1	4	5	6	5	6	3	2	0	0	32
ADVERTISING													
Newspaper			1000	1000	1000	500	500	500	500	0	0		$5,000
Radio			1000	1500	1000	750	750	750	500				$6,250
Direct Mail			3500	3500	3500	3500	3500						$17,500
TV													$0
Promotions				2500									$2,500
Brochure													$0
Signage													$0
Sales Office		500											$500
Postage				25	25	25	25	25	25	25	25		$200
Printing		1500											$1,500
Graphics													$0
													$0
													$0
MODEL HOME EXPENSE													$0
													$0
Furniture Lease			350	350	350	350	350	350	350	350	350		$350
Rent/Lease			450	450	450	450	450	450	450	450	450		$4,050
Utilities			100	100	100	100	100	100	100	100	100		$900
Telephone			350	150	150	150	150	150	150	150	150		$1,550
Cleaning			75	75	75	75	75	75	75	75	75		$675
Maintenance			50	50	50	50	50	50	50	50	50		$450
Supplies			25	25		25		25		25			$125
													$0
SALARIES & COMMISSIONS													$0
													$0
													$0
Salesman		1000	1000	1000	1000	1000	1000	1000	1000	1000			$9,000
Commission	0	1200	4800	6000	7200	6000	7200	3600	2400	0	0		$38,400
TOTAL	0	0	4200	12700	16725	14900	12975	14150	7075	5600	2225	1200	$88,950

Avg Price
$20,000
Commission
6.00%

Total Sales: $640,000

Marketing % Sales: 13.90%

Table 2C

Preliminary Marketing Budget for Scofield Summit

THIRD YEAR

	JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC	TOTA
Sales Est	0	0	1	4	5	4	3	4	3	2	0	0	2
ADVERTISING													
Print media			1000	1000	1000	500	500	500	500	0	0		$5,00(
Radio			1000	1500	1000	750	750	750	500				$6,25(
Direct Mail			3500	3500	3500	3500	3500						$17,50(
TV													$(
Promotions				2500									$2,50(
Brochure													$(
Signage													$(
Sales Office			250										$25(
Postage				25	25	25	25	25	25	25	25	25	$20(
Printing			1000										$1,00(
Graphics													$(
													$(
													$(
MODEL HOME EXPENSE													$(
													$(
Furniture Lease				350	350	350	350	350	350	350	350	350	$35(
Rent/Lease				450	450	450	450	450	450	450	450	450	$4,05(
Utilities				100	100	100	100	100	100	100	100	100	$90(
Telephone				350	150	150	150	150	150	150	150	150	$1,55(
Cleaning				75	75	75	75	75	75	75	75	75	67
Maintenance				50	50	50	50	50	50	50	50	50	$45(
Supplies				25	25		25		25		25		12
													$(
SALARIES &													$(
COMMISSIONS													$(
													$(
Salesman			1000	1000	1000	1000	1000	1000	1000	1000	1000		$9,00(
Commission	0	0	1200	4800	6000	4800	3600	4800	3600	2400	0	0	$31,20(
TOTAL	0	0	3450	12700	16725	12500	10575	11750	7075	5600	2225	1200	$81,00(
													$81,00(

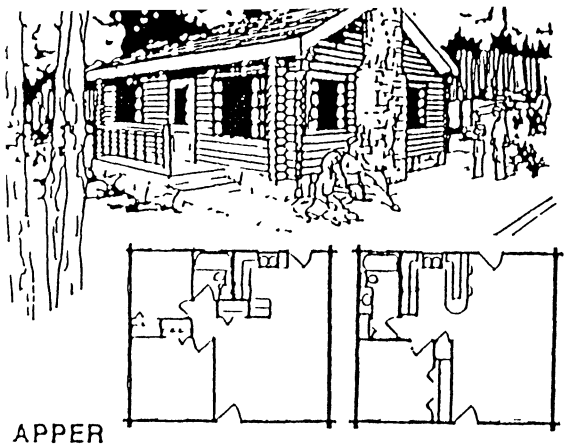
Avg Price
$20,000
Commission
6.00%

Total Sales: $520,000

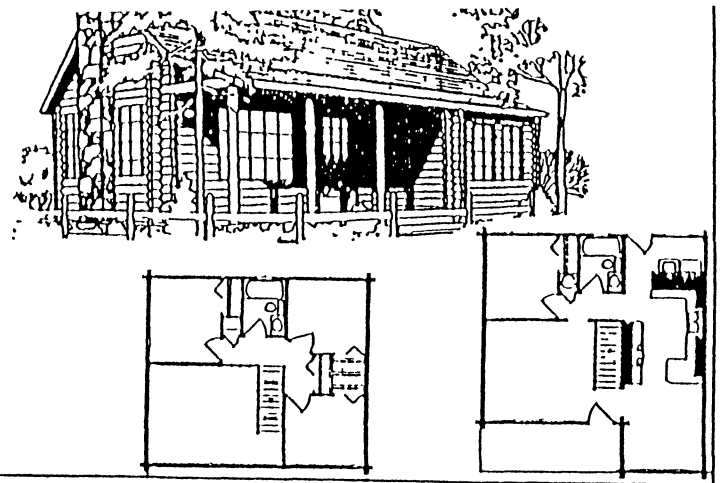
Marketing % Sales: 15.58%

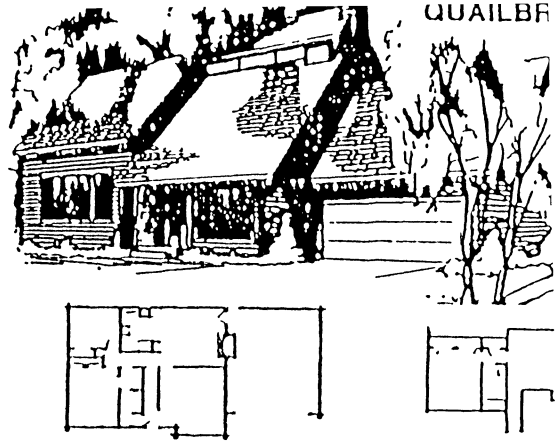
EXHIBIT 1

COMMUNITY CENTER



APPER





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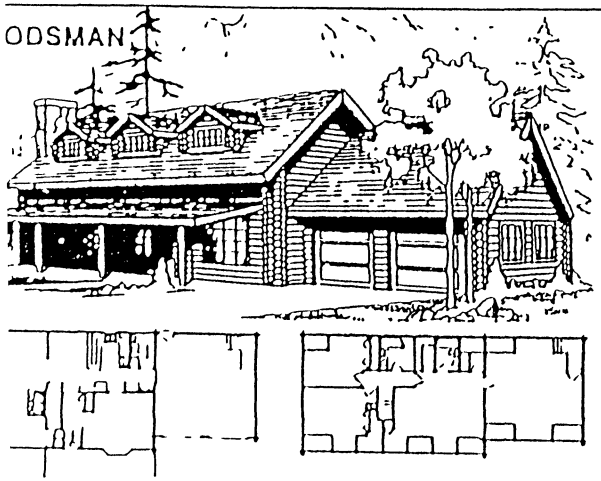

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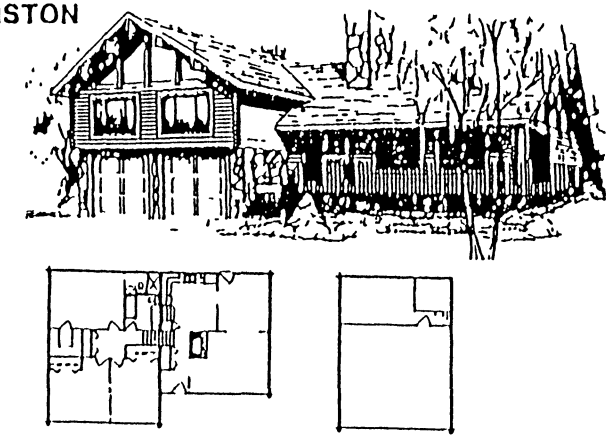

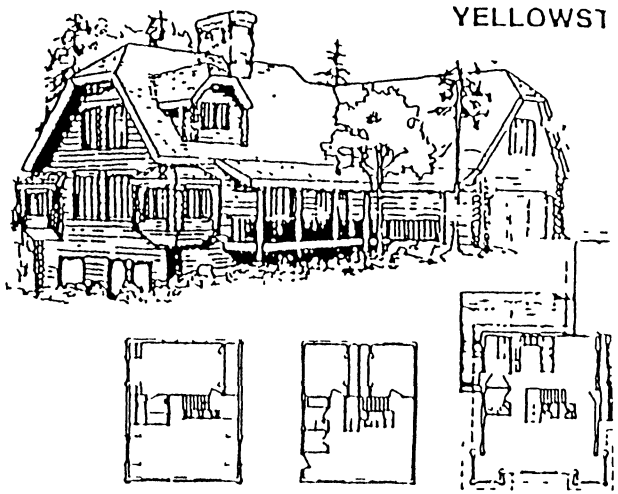

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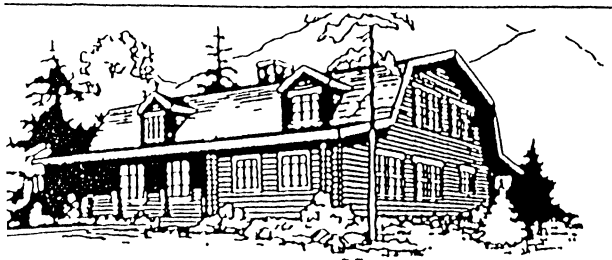

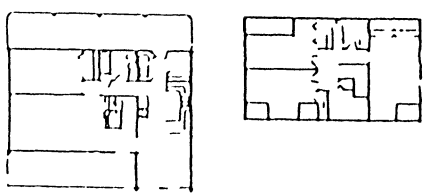

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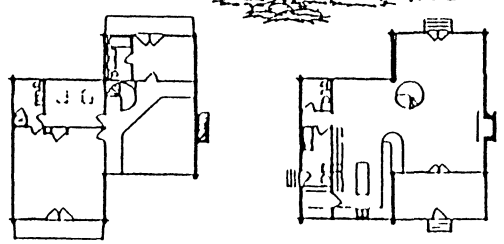

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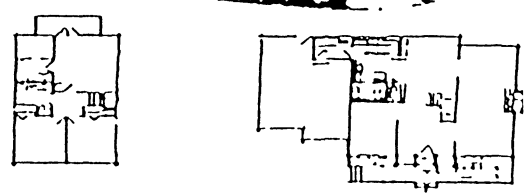

Exhibit 2

PRELIMINARY PRICING

SCOFIELD SUMMIT ESTATES

LOT	PRICE	LOT	PRICE
1	$18,275	45	$21,000
2	$19,500	46	$22,250
3	$13,350	47	$25,000
4	$14,500	48	$21,000
5	$18,750	49	$18,000
6	$19,500	50	$23,450
7	$16,900	51	$23,250
8	$16,750	52	$21,250
9	$21,500	53	$23,000
10	$17,000	54	$22,900
11	$20,250	55	$20,500
12	$17,950	56	$16,250
13	$16,500	57	$17,675
14	$18,250	58	$17,500
15	$22,000	59	$23,250
16	$15,500	60	$18,750
17	$21,350	61	$17,900
18	$18,250	62	$20,500
19	$23,000	63	$19,804
20	$29,900	64	$20,750
21	$24,500	65	$15,300
22	$19,500	66	$16,500
23	$23,250	67	$17,500
24	$20,500	68	$15,000
25	$24,500	69	$19,850
26	$20,350	70	$18,000
27	$20,000	71	$17,500
28	$20,500	72	$22,230
29	$21,000	73	$16,150
30	$24,500	74	$18,500
31	$21,000	75	$17,500
32	$24,500	76	$14,500
33	$20,000	77	$16,850
34	$21,350	78	$18,900
35	$35,000	79	$14,750
36	$38,000	80	$16,000
37	$24,500	81	$15,900
38	$22,000	82	$13,500
39	$18,500	83	$17,150
40	$17,500	84	$15,395
41	$20,150	85	$15,145
42	$19,750	86	$13,000
43	$21,500	87	$14,500
44	$23,000	88	$15,700
		Total:	$1,733,624

Average price: $19,700

STRATEGIC VALUATIONS
1245 East Brickyard Road, Suite 110
Salt Lake City, Utah 84106
(801) 486-2999 • Fax (801) 486-7500

January 24, 1996

Mr. Blake T. Ostler
Kirton & McConkie
1800 Eagle Gate Tower
60 East South Temple
P. O. Box 45120
Salt Lake City, UT 84145-0120

Dear Mr. Ostler:

We have been engaged to review the economic feasibility of the Soldier Summit Development plan to develop the property described below on a stand alone basis.

We have also been asked to compare the economic advisability of implementing a development plan to the alternative of accepting an outstanding offer to purchase the property as is for $2,000,000.

PROPERTY DESCRIPTION

The property under question is 4,246 acres of mountain recreational land that is described in an Appraisal Report dated January 8, 1996, by Jud Howard, MAI as follows:

1. Approximately 97 acres within the townsite of Soldier Summit.
2. An area of approximately 1,451 acres platted and recorded into a mountain home subdivision with 154 lots. The lots include water rights of 75 acre feet that is sufficient to supply the needs for the lots within the property. No site improvements have been made at this date.
3. The remaining open mountain range land consists of 2,698 acres, 598 to the East and 2100 to the West.

In performing our review, we visited the property on December 13, 1995, and found it to be very remote, with the nearest hospital, grocery store and shopping center 32 miles away in Price. The distance of such services is important because fire protection will be required by Utah County.

The 154-lot subdivision was platted and recorded when the property was in the incorporated town site of Soldier Summit, which existed only from 1982 to 1984.

We have reviewed the estimated costs to develop the subdivision lots prepared by Tuttle Engineering as to:

- Site grading for roadways, installation of culverts and sewers, and installation of road base for approximately $1,036,500.

- Installation of an underground electric power system and substation upgrade for approximately $792,000.
- A water supply system, consisting of a well water pump station, a main water line, water service connections, fire hydrants, two booster pumping stations and two water storage tanks with a capacity of 400,000 gallons.
  Total costs for the water system are estimated to be $1, 350,400.

The development requirements are not flexible because they are imposed primarily by Utah County and the State of Utah. The total costs of all of the above improvements will be necessary in order to obtain building permits for permanent structures. Unless these permits can be obtained, the subdivided lots will not be marketable other than as raw land.

The remaining acreage can legally be subdivided into 50 acre plots under current zoning. However, development of that acreage into building lots cannot be economically achieved, due to steep slopes, rocky terrain, lack of trees, low density, costs of improvements and water limitations. We believe this property is best used to support and enhance the subdivided lots so they can be marketed for a better price.

REVENUE PROJECTIONS

Next, we reviewed the original marketing plan dated January 1986, projecting revenues of $ 1,733,624 for 88 home sites. The sites consist of lots of 5 to 10 acres each in phase one at an average price of $19,700, or $2,036 per acre over a three to four year period. We assumed these projections to still be valid today, although they are aggressive, based upon a discussion with David G. Cunningham, a broker knowledgeable in the sale of this type of property.

Mr. Cunningham stated that similar improved property is being advertised today in Sanpete County (20 miles southwest) for $1,000 per acre. It is not known whether this property included common areas as planned for Soldier Summit.

Further confirmation of the reasonableness of the projection was also contained in the real property Appraisal Report prepared by Mr. Harward. He stated that his research and experience strongly indicate that mountain land properties have been stable over the last 10 to 15 years.

Properties in Heber and the Park City area were not considered similar, due to the proximity of medical, retail and recreational facilities compared to those of Soldier Summit.

We have therefore concluded the revenues projected in the 1986 marketing plan is still valid in 1996. Assuming $2036 per acre, the subdivision revenues over a four year period would be $2,954,236, which we have rounded to $3,000,000 for all 154 subdivided lots. We have assumed the following breakdown for revenue projection purposes:

Year 1-20%	$600,000
Year 2-30%	900,000
Year 3-30%	900,000
Year 4-20%	600,000

EXPENSE ASSUMPTIONS

We assumed that the entire amount of development costs would be incurred in year one, with the entire amount borrowed at 10%. One half of the interest would be incurred in the first year. We then assumed marketing costs, commissions, maintenance, and taxes of $150,000 per year would be incurred in each of the four years. This was based upon the original marketing plan projections. The plan projected expenses of $271,450 over the first three years for 88 of the 154 lots, without regard to maintenance and taxes.

CASH FLOW PROJECTION

We constructed a cash flow model to represent the development of Soldier Summit over a four year period, with the following assumptions:

- A construction loan, secured by the personal guarantee of the general partners of Soldier Summit Development of $3,000,000 at 10% interest for four years.
- Expenditure of development costs of $3,178,900 in the first year.
- Revenues of $3,000,000 over the four year period as outlined above.
- Administrative and maintenance expenses of $150,000 per year.
- Positive cash flow after operating and interest expense applied to the principle balance, with any remaining balance due at the end of year four.

We assumed that all revenue and expenditures occurred in the beginning of each period, due to the obvious fact that the result would be negative. In a typical projection, revenue and expenses are projected on a monthly or quarterly basis, however, we deemed that level of detail unnecessary for this analysis.

The projection resulted in negative cash flow of $1,677,400, over the four year period. Discounted at 12%, this amount represents a negative present value of $1,063,436.

A typical real estate investor requires a minimum of a 12% return.
The resulting negative cash flow represents an infinite negative return on the original $ 3,000,000 investment.

CONCLUSION

On the basis of a review of the above, we have concluded that it would not be economically feasible to develop the subdivision because it results in a substantial net loss.

With regard to the offer to purchase the property for $2,000,000, it would be prudent to seriously consider accepting the offer under current market conditions. It appears that the offer is approximately 20% above the fair market value.

Respectfully Submitted,

Robert R. Wietzke, President
Strategic Valuations

David M. Wahlquist - A3349
Blake T. Ostler - A4642
KIRTON & McCONKIE
Attorneys for Defendants Soldier Summit Development,
Homestead Associates, American City Corporation,
International Investment and Development,
Ming-Cheng Lin and Hsiun Mei Lin
60 East South Temple, #1800
Salt Lake City, Utah 84111-1004
Telephone: (801) 328-3600

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

PO-CHENG CHANG, BEATRICE H. CHANG, et al, Plaintiffs, vs. SOLDIER SUMMIT DEVELOPMENT, a Utah limited partnership, et al Defendants.	:	SECOND AFFIDAVIT OF CLARK LIN Civil No. 900905601CN Judge Glenn Iwasaki

---

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Clark Lin, being first sworn upon my oath do depose and say as follows:

1. I am over twenty-one (21) years of age and am otherwise competent to make this Affidavit.

2. I have a bachelor's degree from National Taiwan University, a master's degree from the University of Iowa in water resources and a doctorate from the University of Iowa in hydraulics.

3. I am an experienced civil engineer. I worked for Bauer Engineering in Chicago, was an associate professor in the Department of Civil Engineering for the University of Utah, served as a Utah State House Fellow for Governor Calvin Rampton as a water resource engineer and for several years operated my own engineering consulting business under the name of Uintex.

4. Since 1987, I have been the CEO of Soldier Summit Development.

5. I am acquainted with all of the parties involved in this action. Beginning about 1982 I became aware of the business entities involving the Lins and the Changs and was aware of the Agreement dated February 8, 1982 ("Separation Agreement") whereby the Lins and the Changs sought to separate most of their business relationships.

6. Within a short time after the parties entered into the Separation Agreement, I became aware that Po and Beatrice Chang became limited partners of Soldier Summit Development.

7. I first became involved with Soldier Summit Development in my capacity as a civil engineer early in 1983. I was hired to assist Soldier Summit Development in resolving certain water and access problems relating to the development and to obtain plat approval for two subdivisions in the development.

8. In order to obtain plat approval, the Town of Soldier Summit "(Town") required Soldier Summit Development to enter into an agreement to convey part of its water rights to the Town, obtain approval from the State of Utah to segregate the water rights conveyed to the Town, confirm the existence of an easement providing access across the railroad tracks bordering the Partnership Property, obtain an easement from adjoining land owners to access the proposed subdivisions, prepare engineering details for roads required for the subdivisions, design a water pick up station and vacate an existing subdivision which overlapped the proposed Plat C. From the time I started work on plat approval until the plats were finally approved, I worked full-time on obtaining plat approval.

9. The Town approved Plat C and Plat D late in 1983 and the plats were recorded in December 1983 and January 1984.

10. On April 24, 1984, the State of Utah dissolved the Town. Soldier Summit Development's project was thereafter subject to the jurisdiction of the Special Service District which consists of a commissioner of Utah and Wasatch Counties and a representative of the property owners in the Soldier Summit area. The Special Service District was created to oversee services and development activities on the land previously included within the boundaries of the Town. The Special Service District's development requirements were significantly stricter than those of the Town of Soldier Summit.

11. I believed it was necessary to obtain a HUD Interstate Sales Act approval in order to effectively market the Property. I was aware that prior to my involvement with the project, Soldier Summit Development had hired legal counsel to prepare a HUD registration application. The application had been submitted to HUD but was rejected by HUD due to a number of deficiencies in the proposed project. Soldier Summit Development procured new legal counsel for Soldier Summit Development to cure the deficiencies in the HUD registration application. I was engaged to correct the deficiencies and worked closely with the new legal counsel to revise the application.

12. In 1985, at my recommendation, Soldier Summit Development commissioned a marketing expert to conduct a market study to determine whether it was economically feasible to complete construction of the infrastructure for and market the two platted subdivisions. Mr. Kaspar concluded that although further development was possible:

1. Market conditions indicate that there is a substantial amount of risk in the development of any recreational land. This is highlighted by the subjective nature of the buying process and the lack of demand for recreational land at this time.

2. The absorption for this development will not be quick. Recreational land is no longer fueled by the speculation buyer, therefore a rapid sellout is not reasonable to expect. In the best case scenario 20-30 lots per year will be sold in the 88 lot phase of development.

A copy of Mr. Kaspar's marketing study is attached as Exhibit "D".

13. After Soldier Summit Development reviewed the Kasper report, Soldier Summit Development placed ads in newspapers to determine whether Mr. Kaspar's bleak assessment of the market was accurate for recreational lots. Soldier Summit Development did not receive a single response to any of those ads. Soldier Summit Development management informed me that as a result of Kasper's report and the lack of response to the ads, that they would not proceed with plans for complete infrastructure development until the market improved.

14. During the next several months, I continued the work necessary to perfect Soldier Summit Development's water rights and collected water samples for water quality tests as required by the State. I regularly attended meetings of the Special Service District. I also

monitored the market for recreational property by periodically consulting with local residents and real estate agents. I also investigated options for reducing the cost of road improvement and water delivery systems for the subdivisions.

15. To maintain the Property's Green Belt tax status, I negotiated the terms of a lease to a livestock company for sheep grazing. I also allowed a limited number of seasonal hunters to pay a small sum for hunting privileges on the Property.

16. I continue to monitor the market situation and perform the tasks necessary to comply with State and Special Service District requirements.

Clark Lin

SUBSCRIBED AND SWORN TO before me this 24th day of January, 1997.

NOTARY PUBLIC
BETTY C. PORTER
60 East South Temple, #1800
Salt Lake City, Utah 84111
My Commission Expires 8/10/98
STATE OF UTAH

NOTARY PUBLIC

ERNATIONAL INVESTMENT & DEVELOPMENT CORPORATION
)neficial Life Tower • 36 South State Street • Salt Lake City, Utah 84111, U.S.A.
)ne: (801) 534-1321 • Telex: 388 366 INTERPRISE SLC • Cable: INTERPRISE SLC

January 13, 1982

Tsu Yu Lin
4432 Lone Pine Drive
Salt Lake City, Utah 84117

Let this letter serve as an up date to bring everybody current on the status of the Logan Association Property.

As previously mentioned the property has been subdivided into five commercialy zoned lots arranging in size from ½ acre to approximately 1½ acres. We have improved by putting sewer, water, power, street with curb and gutter and dedicated what is known as Sky Ridge Drive to the City of Logan. The approximate value of holdings is $500,000. Recently we have had architects give artists renderings of potential office buildings suitable to that location. We have taken these artists renderings and created attractive bill board signs that have been constructed on the property offering for sale or lease. Due to general economic conditions in the United States we have had very little response and it is not anticipated that we will be able to sell or develop the property until the economic climate changes.

The 1982 property tax for Logan Plaza is $2,553.65 and the architects work comes to 3,776.00. We are short about $6,000.00 for this years operation. We would like the partners to contribute to help pay these bills. The following is a list of partners portions:

James Lai	$1,800	P.C. Lu	$600	Tsu Yen Lin	$264
Jay Murphy	$ 840	S.C. Lu	$600	Tsu Yu Lin	$264
P.C. Chang	$ 780	P.C. Lu	$600	Wan Cian Lin	$252

If you would take care of this at your earliest convenience it would be greatly appreciated. Thank you.

Sincerely,

Beatrice Chang

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

-oOo-

PO-CHENG CHANG, et al.,	)	
	)	
Plaintiffs,	)	Civil No. 900905601
	)	
vs.	)	Deposition of:
	)	
SOLDIER SUMMIT DEVELOPMENT, a Utah limited partnership, et al.,	)	PO-CHENG CHANG
	)	Judge Glenn Iwasaki
	)	
Defendants.	)	
	)	CERTIFIED COPY

-oOo-

BE IT REMEMBERED that on the 1st day of March, 1993, the deposition of PO-CHENG CHANG, produced as a witness herein at the instance of the Defendants, in the above-entitled action now pending in the above-named court, was taken before Melinda J. Andersen, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of 9:15 a.m. of said day, at the offices of Kirton, McConkie & Poelman, 1800 Eagle Gate Tower, 60 East South Temple, Salt Lake City, State of Utah.

That said deposition was taken pursuant to Notice.

in Soldier Summit, Utah?

A Yes.

Q At the time that Soldier Summit limited partnership was formed did you have any responsibilities with respect to that particular partnership?

A I was the president of American City Development Corporation, which is a sole general partner of Soldier Summit Development.

Q At that time did you have an understanding as to the responsibilities of the general partner in that limited partnership?

A Yes.

Q What was your understanding of those responsibilities?

A To serve as a general partner of the limited partnership of Soldier Summit Development, to do whatever necessary effort to develop 4,500 acres of property for the best interest for all partners of the partnership.

Q Did you have any involvement in the acquisition of 4,500 acres by the partnership?

A Yes.

Q What involvement did you have in that activity?

A I participated with Jay Murphy under the directions of Ming-Cheng Lin to negotiate with United Farm to purchase this subject property.

1982." Do you see that allegation?

A Yes.

Q Do you agree with the allegation that the marketing of the Soldier Summit property could and should have taken place as early as 1982?

A Absolutely.

Q So when you allege in Exhibit 1 that ACC has breached its obligations to you as a limited partner by failing to develop the property, you believe that that breach started in 1982?

A Yes.

Q What do you believe should have been done in 1982 with respect to the development of the property?

A Real estate development, especially the development of this type of unique property, timing, timing of development is critical.

Q Why?

A The development of this type of property could only get harder and harder because of the governmental regulations. The reason why we developed tremendous amount of effort to annex this property to Soldier Summit is the reason as I described before. When there is such a land mass annexed into a city of that size, you naturally make the other political entity such as Wasatch County and Utah County not happy purely from political and revenue reasons.

Q When you say they needed to complete the construction subject to the city's final input, are you including in that input any improvement of the water system that needed to be done?

A At this moment I cannot recall what kind of specific input the city has, but I recall there were pick-up stations to be installed.

Q That had not been done?

A I don't believe the physical work of that part was started when I left American City Corporation.

Q When did you first learn that phase 1 and phase 2 were not developed by the end of 1982?

A Well, we continuously asked for the update for the past ten years, and initially from 1982 to approximately 1985 they kept promising in very general terms that the property would be in the market shortly and would be a very successful project, but never specifically inform us what kind of progress they had made.

Q Did you know in early 1983 that the property had not yet been marketed?

A They didn't tell us they had been in the market.

Q Did you know it had not been in the market in early 1983?

A They just told us they are not ready yet.

Q So your answer is yes you knew that because they

told you they were not ready yet?

A Yes, I know they are not in the market.

Q Did you complain to them at the time that ACC was not doing what it should be doing under the partnership agreement?

A Yes.

Q Who did you make that complaint to?

A To American City Corporation.

Q Do you recall who at American City you made that complaint to?

A I don't know specifically who, but either H.L. Lai or Ming-Cheng Lin.

Q Did you tell them they were breaching their obligation under the partnership agreement?

A I don't know whether we said that in such strong words, but individually besides myself as well as Jay Murphy I recall both of us write very specific letters to urge them to do such kind of move.

Q Did you consider American City to be in breach of its obligation under the partnership agreement in early 1983 for failure to develop?

A I don't think at that time I considered at that stage they had breached the contract or breached the agreement as you term it.

Q Approximately when did you send the letter you

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-ooOoo-

PO-CHENG CHANG, et al,	CIVIL NO. 900905601
Plaintiffs,	DEPOSITION OF: PO-CHENG CHANG, VOL. IV
v.	TAKEN: January 28, 1997
SOLDIER SUMMIT DEVELOPMENT, a Utah limited partnership, et al,	COPY
Defendants.	

-ooOoo-

Deposition of PO-CHENG CHANG, taken on behalf of the Defendants, at 60 East South Temple, Suite 1800, Salt Lake City, Utah, before ROCKIE E. DUSTIN, Certified Shorthand Reporter and Notary Public in and for the State of Utah, pursuant to Notice.

-ooOoo-

Depomax SM
REPORTING SERVICES, LLC
525 FIRST INTERSTATE PLAZA
170 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101
(801) 328-1188 / 1-800-DEPOMAX
FAX 328-1189

than six months. Did you rely upon anything in the letter to either take some action or to fail to take some action?

MR. STEPHENS: I object to the question. I think the time period may have been inclusive of '84.

THE WITNESS: Well, with that type of letter naturally the -- at least lead me not to worry about the progress of the project.

Q. So you relied upon the representation by not worrying about it?

A. And anticipating the project would be on the market to generate return and income in the very near future.

Q. Anything else you did to rely upon the representation in the letter that the marketing would occur shortly?

A. Well, the -- not that I can think of.

Q. What would you have done differently had the representation not been in the letter?

A. I would definitely be more active as limited partners to urge the general partner to take necessary actions to continue the effort accomplished up to 1982 and get the job completed.

Q. Has there been any time you haven't diligently urged the general partner to undertake

those activities?

A. Yes.

Q. When?

A. In certain periods I just assume that everything is being done with due diligence by the general partners.

Q. What period?

A. I don't remember the period. That depends upon the period of the communications our office had with IID or ACD's entities.

Q. And you knew within six months after receiving the letter that the property was not on the market; isn't that true?

A. Yes.

Q. The second item that you mentioned was a partnership meeting that you attended in, I believe you said 1982 or 1983. You didn't recall exactly who said what, but you understood from the meeting that property would be developed within six months to a year.

A. This is the impression I got.

Q. You couldn't recall that anybody really said to you, It will be developed within six months to a year; is that correct?

A. I think that the discussions, when you term

develop, is primarily related to what needs to be done to get the final approval and put this one into the market. So when you say developed, it's maybe a different understanding to me about the -- what we were talking about marketing.

Q. Let me rephrase the question.

Do you recall anybody specifically telling you at the meeting that the property would be placed on the market within six months to one year?

A. No.

Q. And you certainly knew one year after the meeting that the property had not yet been placed on the market?

A. That's true. But that continuously led me to believe they were working on this one.

Q. What did you do or not do in reliance upon the representation you understood from the meeting?

A. If I knew, for example, like the Plat C, Plat D, were recorded, the performance bond, and the detail requirement was specified, I would urge the general partner to finish this improvement as soon as possible.

Q. On the 1982, 1983 meeting, the plats hadn't been recorded yet, nor had there been bonds given; is that right?

MR. STEPHENS: Again, I'm not sure you have that communication correctly pegged as to time.

Q. Isn't that correct?

A. That's correct.

Q. So in this meeting you described as having occurred in '82 or '83, what did you do or not do in reliance upon what you understood from the meeting?

A. Well, when we have the chance to meet at the first time I began to realize, you know, that so-called putting the market -- put the property into the market is still far away because they are still working on -- or try to understand what needs to be done to get the final plat approved. But like meeting like in '82, '83, you know, replaced whatever the impression from the letter and then led us to believe in another one following that something is coming, something is being done. So based upon this, we did not specifically urge or try to find a detail of what should be done, why something was not done.

Q. Anything else you did in reliance upon the meeting?

A. No.

Q. Let's go to the next incident that you have described, which was a meeting you believe occurred either in 1984 or 1986, the meeting that you believe

was recorded. I believe you had said there was some discussion of how to take care of a water tank or pickup station and some discussion about the bond. What did you do in reliance on the information you understood from that meeting?

A. Well, again, you know, from that meeting my anticipation is that this property would be on the market, you know, again were maintained, so I take the same position as I did before.

Q. When you're talking about the property being on the market in the course of these discussions, you're referring to the Plat C and D?

A. Yes.

Q. When you referenced another meeting that you thought might have occurred in 1987, you didn't know who exactly said what in that meeting -- maybe it's not correct to even call it a meeting, I think you said there was some communication -- but it led you to believe that the physical improvements were done or nearly done and that there would be some market study performed. What action did you take or refrain from taking in reliance upon the information you got from that particular communication?

A. Well, I anticipated, whatever the study, a continuous monitoring of that, it would be prepared,

the property, ready for marketing when the market arrives. The fundamental thing that needs to be prepared is we need to get the improvement done, get the necessary registration done. And it turned out the improvement was never done, completely done. The registration was never completed. So even if we look back now, even the market was acceptable, we are really not ready to put the property into the market.

MR. WAHLQUIST: Would you read back his answer, please.

(Whereupon the record was read by the reporter as follows:

ANSWER: Well, I anticipated, whatever the study, a continuous monitoring of that, it would be prepared, the property, ready for marketing when the market arrives. The fundamental thing that needs to be prepared is we need to get the improvement done, get the necessary registration done. And it turned out the improvement was never done, completely done. The registration was never completed. So even if we look back now, even the market was acceptable, we are really not ready to put the property into the market.)

Q. I'll return to my question.

What did you do or not do in reliance upon information you received from this 1987 communication?

A. Well, as I mentioned before, with that information I simply assumed that when the market is going to be ready, they would put this one immediately on the market.

Q. So you didn't do anything other than assume that it would be -- that when the market was ready, the property would be marketed?

A. Right.

Q. Did you refrain from doing anything because of the information you received?

A. Yes.

Q. What would you have done if you had not received the information, which you didn't do because you received it?

A. Well, you know, I would -- you know, with unusual length of the performance bond, I would urge them to get these things done as soon as possible because we are, you know, risking ourselves to a very dangerous position.

Q. Didn't you tell them that in the 1987 communication, that you thought they ought to get it done as quickly as they could?

A. In 19?

Q. '87, when you received this information about the market study.

A. That is not the understanding I have at that time.

Q. You did not tell them that they ought to get everything done as quickly as possible?

A. Because I was led to believe that all the improvement and necessary registration are going to be done soon and could react to the market any time.

Q. Did someone tell you that the HUD registration had been completed?

A. No. That is not the impression, even at the present time, that I get the impression that we had the HUD registration. If there is such a thing, I have never seen a complete one.

Q. You talked about some letters also that you received. Do you remember the dates on any of those letters or the approximate time of any of those letters?

A. No.

Q. Do you remember how many there are?

A. No.

Q. Do you recall whether you did anything in reliance on those letters?

A. Not in particular, I can't remember.

Q. Is there anything you refrained from doing because of those letters?

A. No.

Q. Let's return for a few minutes to the time prior to the acquisition of the Soldier Summit property by you. When did you first communicate with Mr. Lin about the possibility of an investment in Soldier Summit?

A. I don't remember.

Q. Sometime after Mr. Donovan first approached you about the property?

A. Yes.

Q. Did you ever prepare any kind of a written summary of the project or investment opportunity for Mr. Lin to review and consider whether or not he wanted to be involved in the investment?

A. Well, for an important investment opportunity like this, I must have written some letter.

Q. Do you have a copy of that letter?

A. I don't believe so.

Q. You don't have anything like that in your files?

A. No.

Q. Do you recall when you first learned that RLC Investment, Inc. had paid only $555,000 for the property?

A. Well, you mean me?

violate the automatic stay provisions of the federal bankruptcy code, because a renewal is not an attempt to enforce, collect, or expand the original judgment. Barber v. Emporium Partnership, 800 P.2d 795 (Utah 1990).

Stipulations.

Parties to contract may stipulate for period of limitations shorter than that fixed by statute of limitations. Clark v. Lund, 55 Utah 284, 184 P. 821 (1919).

Support or maintenance.

The eight-year statute of limitations applies to past due unpaid installments for alimony or support of minor children, and therefore execution may issue only for the arrearages accumulated within a period of eight years. Seeley v. Park, 532 P.2d 684 (Utah 1975).

A Utah action brought in 1978 to enforce a 1975 Ohio action for support arrearages, which also included a 1967 Ohio action for support arrearages, was timely filed under this section. Logan v. Schneider, 609 P.2d 943 (Utah 1980).

Wife could apply her time-barred claim for child support arrearages to offset her husband's lien on the marital home, and then affirmatively assert her claim for past due support that had accrued within the limitations period. Coulon v. Coulon, 915 P.2d 1069 (Utah Ct. App. 1996).

Tolling.

In action by administrator, indebtedness created by check was held to be barred, and statute was not tolled by unauthorized acts of plaintiff. Bingham v. Walker Bros., Bankers, 75 Utah 149, 283 P. 1055 (1929).

Action to renew a judgment brought more than eight years after the date of entry of the original judgment was barred by this section even though defendant had signed a written agreement acknowledging the obligation and had made some payments thereon less than eight years before commencement of the action. The common-law rule which tolled the limitation period in case of acknowledgment or part payment is limited by § 78-12-44 so that it now applies only to contract actions. Yergensen v. Ford, 16 Utah 2d 397, 402 P.2d 696 (1965).

Cited in Van Tassell v. Shaffer, 742 P.2d 111 (Utah Ct. App. 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d Divorce and Separation §§ 1073, 1074; 46 Am. Jur. 2d Judgments § 897 et seq.

C.J.S. — 27C C.J.S Divorce §§ 684 to 693; 50 C.J.S. Judgments §§ 854, 871; 67A C.J.S. Parent and Child §§ 73 to 89.

A.L.R. — Statute of limitations: effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued, 28 A.L.R.3d 1141.

Key Numbers. — Divorce ⇦ 311; Judgment ⇦ 910, 934; Parent and Child ⇦ 3.3(4), 3.4(2).

78-12-23. Within six years — Mesne profits of real property — Instrument in writing.

An action may be brought within six years:

(1) for the mesne profits of real property;

(2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-23; L. 1984, ch. 16, § 2; 1996, ch. 79, § 109; 1996, ch. 210, § 5.

Amendment Notes. — The 1996 amendment by ch. 79, effective April 29, 1996, in the introductory paragraph, substituted "An action may be brought within" for "Within"; deleted "An action" at the beginning of Subsections (1) to (3); and in Subsections (1) and (2), substituted a semicolon for a period.

The 1996 amendment by ch. 210, effective April 29, 1996, deleted former Subsection (3) regarding distribution of criminal proceeds to victims.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Cross-References. — Product Liability Act, statute of limitations, § 78-15-3.

Promise to pay extends period, § 78-12-44.

Three-year limitation period for action on written insurance contract, § 31A-21-313.

COLLATERAL REFERENCES

C.J.S. — 54 C J S Limitations of Actions § 33 et seq

Key Numbers. — Limitation of Actions ⇨ 58(2)

78-12-25. Within four years.

An action may be brought within four years

(1) upon a contract, obligation, or liability not founded upon an instrument in writing, also on an open account for goods, wares, and merchandise, and for any article charged on a store account, also on an open account for work, labor or services rendered, or materials furnished, provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received,

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10,

(b) Subsection 25-6-5(1)(b), or

(c) Subsection 25-6-6(1),

(3) for relief not otherwise provided for by law

History: L. 1951, ch. 58, § 1; C. 1943, Supp , 104-12-25; L. 1988, ch. 59, § 14; 1996, ch. 79, § 110.

Amendment Notes. — The 1996 amendment, effective April 29, 1996, in the introductory paragraph, substituted "An action may be brought within" for "Within", deleted 'An action" at the beginning of Subsections (1) and (3), and made stylistic changes

Cross-References. — Antitrust Act actions, § 76-10-925

Product Liability Act, statute of limitations, § 78-15-3

NOTES TO DECISIONS

ANALYSIS

COLLATERAL REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d Building and Construction Contracts § 114.

A.L.R. — What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor, 1 A.L.R.3d 914.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

Application of statute of limitations in private tort actions based on injury to persons or property caused by underground flow of contaminants, 11 A.L.R.5th 438.

Key Numbers. — Limitation of Actions ⇨ 55(3).

78-12-26. Within three years.

An action may be brought within three years:

(1) for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass;

(2) for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant;

(3) for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake;

(4) for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state;

(5) to enforce liability imposed by Section 78-17-3, except that the cause of action does not accrue until the aggrieved party knows or reasonably should know of the harm suffered.

History: L. 1951, ch. 58, § 1; c. 1943, Supp., 104-12-26; L. 1986, ch. 143, § 1; 1996, ch. 79, § 111.

Amendment Notes. — The 1996 amendment, effective April 29, 1996, in the introductory paragraph, substituted "An action may be brought within" for "Within"; deleted "An action" at the beginning of Subsections (1) to (5); and made stylistic changes.

Cross-References. — "Action" includes special proceeding, § 78-12-46.

Livestock branding, Title 4, Chapter 24.

Product Liability Act, statute of limitations, § 78-15-3.

Right of action for waste, § 78-38-2.

Three-year period for actions on insurance contracts, § 31A-21-313.

NOTES TO DECISIONS

ANALYSIS

CINCINNATI BELL CELLULAR SYSTEMS COMPANY, an Ohio corporation, Plaintiff,
v.
AMERITECH MOBILE PHONE SERVICE OF CINCINNATI, INC., a Delaware corporation, Cincinnati SMSA Limited Partnership, a Delaware limited partnership, 360 < < degrees > > > Communications Company, a Delaware corporation, The Champaign Telephone Company, an Ohio corporation, Git-Cell, Inc., an Ohio corporation, and Ameritech Mobile Communications, Inc., a Delaware corporation, Defendants.

Civ. A. No. 13389.

Court of Chancery of Delaware, New Castle County.

Submitted: April 26, 1996.

Decided: Sept. 3, 1996.

Vernon R. Proctor and John H. Newcomer, Jr. of Bayard, Handelman & Murdoch, P.A., Wilmington (James R. Adams, William D. Baskett, III, and Michael F. Haverkamp, of Frost & Jacobs, Cincinnati, Ohio; and Alan R. Bromberg and George W. Coleman of Jenkins & Gilchrist, Dallas, Texas, of counsel), for Plaintiff.

Richard L. Sutton, Paul P. Welsh, Thomas C. Grimm, Matthew B. Lehr and Maryellen Noreika of Morris, Nichols, Arsht & Tunnell, Wilmington, for Defendants Ameritech Mobile Phone Service of Cincinnati, Inc. and Ameritech Mobile Communications, Inc.

Richard D. Kirk of Morris, James, Hitchens & Williams, Wilmington, for Defendant 360 < < degrees > > Communications Company.

Thomas A. Beck of Richards, Layton & Finger, Wilmington, for Defendants Git- Cell, Inc. and The Champaign Telephone Company.

MEMORANDUM OPINION

CHANDLER, Vice Chancellor.

***1** Plaintiff in this lawsuit seeks judicial dissolution and ultimately the sale of a Delaware limited partnership engaged in providing cellular telephone services. The case illustrates the partnering arrangements that increasingly characterize the telecommunications industry's effort to exploit emerging technologies and to meet increasing competitive pressures. Because technology (along with competitive interests) often advances in ways unanticipated by the entities that create these partnering arrangements, this kind of litigation should not be unexpected.

In 1982, plaintiff Cincinnati Bell Cellular Systems ("Cincinnati Bell") and defendant Ameritech Mobile Phone Services of Cincinnati ("AMPS") [FN1] formed a limited partnership (the "Partnership") to "fund, establish and provide" cellular mobile services within and including the geographic area bounded by Cincinnati, Dayton and Columbus, Ohio. See Agreement Establishing Cincinnati SMSA Limited Partnership (the "Partnership Agreement" or "P. Agmt.") §§ 1.3, 2.5. AMPS, the Partnership's general partner, is a wholly-owned subsidiary of defendant Ameritech Mobile Communications, Inc. ("AMCI") which, in turn, is a wholly-owned subsidiary of Ameritech Corporation ("Ameritech Corp." and collectively with AMCI and AMPS, "Ameritech"). Ameritech Corp. is the regional bell company for the Columbus and Dayton markets. Cincinnati Bell, one of the Partnerships limited partners, is the regional bell company for Cincinnati. Ameritech owns 52.793% of the Partnership, 12.793% as a limited partner and 40% as the general partner. Cincinnati Bell owns a 45.067% limited partnership interest in the Partnership. Sprint Cellular Company (recently renamed as 360 < < degrees > > Communications Company), the Champaign Telephone Company and Git-Cell, the other limited partners, collectively own 2.14% of the Partnership.

> FN1. In 1982, AT & T owned AMPS, formerly Advanced Mobile Phone Services. Later, however, AT & T divested itself of this subsidiary. Thus, Ameritech Corp. now owns AMPS.

In July of 1994, Cincinnati Bell filed an amended and supplemental complaint requesting several forms of relief. [FN2] First, Cincinnati Bell requests this Court to dissolve the Partnership pursuant to 6 Del.C. § 17-802 and appoint a liquidating trustee to effectuate the dissolution. Count I asks the Court to dissolve the Partnership, alleging that it is not

reasonably practicable to carry on the Partnership's business for its intended purpose. Count II alleges Ameritech has breached unspecified fiduciary duties to the limited partners and committed gross negligence in managing the Partnership. Cincinnati Bell also pleads demand futility in this Count. [FN3] Count III claims that Ameritech has been involved in self-dealing, in breach of their fiduciary duties, by failing to sell the Partnership and continuing to employ AMCI as the general partner. In Cincinnati Bell's view, a more effective manager could have produced a higher rate of return for the Partnership. [FN4]

FN2. Cincinnati Bell filed its initial complaint on February 23, 1994. It contained the same causes of action as the amended and supplemental complaint.

FN3. Ameritech does not contest the futility of demand allegation.

FN4. In addition to dissolution, damages and attorney fees, Cincinnati Bell requests this Court to order Ameritech to account to Cincinnati Bell for all transactions since the Partnership's formation and to provide Cincinnati Bell with all Partnership records. The parties did not mention the request for an accounting in the briefing on the pending motions.

Before me now are the parties' cross-motions for summary judgment. Cincinnati Bell moves for summary judgment as to Count I's request for dissolution and Count III's claim that Ameritech breached unspecified fiduciary duties to the limited partners by failing to sell the Partnership. However, as to Count II's claim for gross negligence in managing the Partnership and Count III's self-dealing claim concerning Ameritech's duty to sell the Partnership, Cincinnati Bell argues that issues of fact exist which preclude summary judgment. Ameritech also moves for summary judgment and does so as to each of the three counts.

***2** The parties have generated a substantial record. After carefully reviewing that record, the amended complaint and the parties' extensive briefing on the legal issues, I conclude that summary judgment should be granted on all counts of the complaint in favor of defendants and against plaintiff.

I. SUMMARY JUDGMENT STANDARD

The Court may award summary judgment if the moving party establishes that no genuine issue of material fact exists with respect to the dispute and that he or she is entitled to judgment as a matter of law. Ch.Ct. Rule 56(c); Gilbert v. El Paso Co., Del.Supr., 575 A.2d 1131 (1990). When the non-moving party has the ultimate burden of proof on its claims, this Court may grant summary judgment if the moving party can demonstrate a complete failure of proof on an essential element of a claim. Burkhart v. Davies, Del.Supr., 602 A.2d 56, 60 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 316, 322-23 (1986)). If the moving party properly supports its motion, then the burden shifts to the non-moving party to demonstrate that material issues of fact exist so that summary judgment is inappropriate. State v. Regency Group, Inc., Del.Super., 598 A.2d 1123, 1129 (1991).

Further, the Court must assume that uncontroverted facts which are set forth in the record are true. Tanzer v. Int'l Gen. Indus., Inc., Del.Ch., 402 A.2d 382 (1979). On a cross-motion for summary judgment, the Court may imply both that the parties concede the absence of material factual disputes and acknowledge that the record is sufficient to support their motions. Merrill v. Crothall-American, Inc., Del.Supr., 606 A.2d 96, 100 (1992).

II. THE UNDISPUTED FACTS

The Partnership is governed by the Partnership Agreement and the Delaware Limited Partnership Act, 6 Del.C. §§ 17-101--17-1109. The Partnership Agreement allows Ameritech, as general partner, to determine if the Partnership requires additional capital to fund expansion or operations of the business. P.Agmt. § 5. It does not limit the amount of capital that the general partner may request. Rather, if a partner does not wish to participate in that capital call, then it may choose not to contribute. In that case, the non- participating partner's interest in the Partnership is diluted accordingly. Id.

Each year since the parties formed the Partnership, Ameritech, as general partner, has required its limited partners to make capital contributions. From 1984 through 1994, the partners contributed a total of $* [FN5] million to the Partnership. Each of the partners, including Ameritech, has participated in

the capital calls. In 1995, the Partnership made its first capital distribution of $* million.

FN5. Throughout this Opinion, an asterisk denotes proprietary information redacted by the Court with the parties' consent.

The Partnership Agreement allows a limited partner to sell its interest in the Partnership. If a limited partner wishes to sell its interest, the Partnership Agreement grants the current partners the first right of refusal to purchase that interest. P.Agmt. § 11. The Partnership Agreement also allows the limited partners to withdraw from the Partnership. In that case, the Partnership must pay the limited partner for its interest. P.Agmt. § 12.

*3 The Partnership Agreement allows the partners to dissolve the Partnership if the partners unanimously agree to do so. P.Agmt. § 14.1(e). Only Cincinnati Bell seeks to dissolve the Partnership. The Delaware Limited Partnership Act also provides a judicial method of dissolution should the Court of Chancery find that "it is not reasonably practicable to carry on the business in conformity with the partnership agreement." 6 Del.C. § 17-802.

The Partnership Agreement charges Ameritech, as general partner, with the following duties. First, it must act in the best interests of the Partnership. Second, the general partner must manage the Partnership, file all instruments required by law, maintain the Partnership's accounts, furnish financial statements, and develop an annual business plan. P.Agmt. § 8. Notably, however, the Partnership Agreement exculpates Ameritech from liability for loss to the Partnership or the limited partners for "any act or failure to act" unless that act or omission amounts to willful misconduct or gross negligence. P.Agmt. § 16.1. Further, the Partnership Agreement does not provide the limited partners with a method by which they may remove Ameritech as general managing partner of the Partnership.

The Partnership Agreement denotes the following as the Partnership's business purpose--"to fund, establish, and provide Cellular Service" in the specified geographic area. P.Agmt. § 1.3. The Partnership Agreement does not specify a certain time by which the Partnership must be profitable or any other measure of performance that, if not met, will signify that the Partnership is performing outside of its business purpose or is a basis upon which a partner may seek dissolution. However, in the event that the partners dissolve the Partnership, the Partnership Agreement requires the general partner to distribute its license to provide cellular services in the Cincinnati SMSA, as well as the assets involved in this service, to Cincinnati Bell. P.Agmt. § 14.3.

The Partnership has provided cellular services to its chosen geographic area for approximately ten years. It has increased its subscriber base from 7,692 in 1984, to over *, generating revenues of approximately $* million. The Partnership has also improved its operating cash flows. In its first five years of existence, the Partnership produced negative cash flows. In contrast, over the last five years, the Partnership has produced positive cash flows. For example, in 1994, the Partnership netted a positive cash flow of over $* million. The parties dispute whether the Partnership has performed adequately as a financial matter, especially compared to other cellular service providers. No one disputes that the Partnership made its first partnership distribution in 1995 in the amount of $* million.

In the coming years, cellular service providers will face increasing amounts and forms of competition. Cincinnati Bell appears especially concerned about competition from "personal communication service" or "PCS" providers. Analysts project that AT & T and GTE may begin providing PCS services as soon as 1997. In spite of the Partnership's less than stellar performance and the forecasted increase in competition, Cincinnati Bell's own expert projects that the business is worth $* million. [FN6]

FN6. Cincinnati Bell's expert claims that its projection of the Partnership's worth is based on the assumption that the Partnership is managed by an entity other than Ameritech. Under Ameritech's management, Cincinnati Bell projects that the Partnership has a zero net present value. Ameritech, however, disputes this fact. Lehman Brothers, Ameritech's expert, values the Partnership at $* million.

*4 Apparently, the cellular phone service business is not merely a complement to landline services. Instead, Cincinnati Bell has found that cellular

services compete directly with landline service. Importantly, the Partnership Agreement does not contain a non-competition clause whereby the partners are limited from competing with one another. On the contrary, the Partnership Agreement provides that the partners are permitted to resell cellular services or equipment independently from the Partnership either in or outside of the Partnership's geographic area. However, if a partner chooses to resell services or equipment, the transaction must be on an arms-length basis. P.Agmt. §§ 8, 10.

On February 8, 1996, President Clinton signed the Telecommunications Act of 1996 (the "Act") into law. Pub.L. 104-133, 110 Stat. 56 (1996). The Act allows greater competition in the telecommunications industry. For example, the Act allows the regional Bell companies, including Ameritech and Cincinnati Bell, to compete with one another. Apparently, Ameritech intends to take advantage of this new business opportunity. Ameritech issued a notification stating that Ameritech Communications, Inc. ("ACI") is AMCI's agent with respect to ordering and providing telecommunications services and facilities. Then Ameritech notified its partners, including Cincinnati Bell, that the Partnership will begin offering long distance cellular services "bundled" with local cellular services in states such as Ohio. This packaging of services allows customers to purchase cellular and landline services from one entity. Cincinnati Bell also provides long distance services with its own long distance subsidiary, Cincinnati Bell Long Distance Inc. The bundling will allow Ameritech Corp. to compete with Cincinnati Bell's primary business, its landline services. Therefore, ACI's plan to bundle services is particularly aggravating to Cincinnati Bell. Although Cincinnati Bell has expressed concern about the bundling, Ameritech's notification states that the profits from the arrangement will accrue to the Partnership.

III. DISCUSSION

A. COUNT I: Judicial Dissolution Pursuant to 6 Del.C. § 17-802.

In Count I of the amended complaint, Cincinnati Bell seeks dissolution of the Partnership and appointment of a liquidating trustee. Both parties request summary judgment in their favor as to Count I pursuant to 6 Del.C. § 17- 802. Under this section, the Court of Chancery may dissolve a limited partnership when "it is not reasonably practicable to carry on the business in conformity with the partnership agreement." 6 Del.C. § 17-802 (emphasis added).

Ameritech opposes dissolution and argues that Cincinnati Bell has not provided the Court with any rationale on which the Court may dissolve the Partnership pursuant to § 17-802. Ameritech emphasizes that the Partnership is serving its stated purpose "to fund, establish and provide Cellular Service." Ameritech notes that the Partnership Agreement does not require the Partnership to be the best in the industry or to meet any level of economic performance. In any case, Ameritech's expert, Lehman Brothers, estimates that the business can be profitable; their discounted cash flow analysis indicated that the business is worth $* to $* million. Further, Cincinnati Bell's own expert testified that the opportunity to carry on the Partnership's business is extremely valuable, estimating that the business is worth between $* and $* million. In fact, all of the partners, except Cincinnati Bell, wish to carry on the business, with or without Cincinnati Bell.

***5** In contrast, Cincinnati Bell argues that two bases exist on which this Court may grant summary judgment in its favor on the dissolution claim. First, Cincinnati Bell argues that the Partnership has not performed adequately in the past and will fare worse with increased competition from the PCS providers. Cincinnati Bell insists that the Partnership's purpose is to generate economic returns. It notes that, by definition, the law presumes that Delaware partnerships are "for profit" entities, citing 6 Del.C. § 1506 (defining "partnership" as two or more entities associated to carry on a business for profit). In support of its argument, Cincinnati Bell claims that the present situation mirrors the situation in PC Tower Center, Inc. v. Tower Center Dev. Assoc., L.P., Del.Ch., C.A. No. 10788, Chandler, V.C. (June 8, 1989) where the Court dissolved the partnership pursuant to § 17-802 based upon the finding that the partnership in question was unlikely to turn a profit at any point in the foreseeable future.

In evaluating whether to dissolve a partnership pursuant to § 17-802, courts must determine the business of the partnership and the general partners

ability to achieve that purpose in conformity with the partnership agreement. Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prod., Inc., Del.Ch., C.A. No. 12036, Allen, C. (July 28, 1993), Mem.Op. at 2 (citing PC Tower Center, Inc. v. Tower Center Dev. Assoc., L.P., Del.Ch., C.A. No. 10788, Chandler, V.C. (June 8, 1989)). In the present case, the Partnership Agreement states that the Partnership's business purpose is "to fund, establish and provide Cellular Service" in the specified geographic area. P.Agmt. § 1.3. The Partnership Agreement does not establish a time schedule by which the Partnership must be profitable or any other measure of performance. Nor does the Partnership Agreement establish required performance standards. Further, Cincinnati Bell has failed to provide any evidence suggesting that the parties were not intentionally silent on this point when they entered the Partnership Agreement.

Moreover, Cincinnati Bell has not suggested a reasonable time period which the parties surely would have specified had they considered the issue. The Court will not find an implied reasonable time period for performance of a contract where the agreement is silent on that point. See Gluckman v. Holzman, Del.Ch., 53 A.2d 246 (1947) (relying on the fact that the parties were intentionally silent on the time period for performance). Cf. Bundesen v. Beck, Del.Ch., C.A. No. 11347, Berger, V.C. (June 23, 1992) (Bundesen II), Mem.Op. at 5 (finding that if the parties did not intentionally omit a time period for performance, then the Court may add some reasonable time frame for performance to the agreement).

In spite of the fact that the Partnership appears to be operating within its stated business purpose, Cincinnati Bell believes the Court should dissolve the business because its financial position is so weak that it is impractical to carry on the business. However, the record shows that the Partnership has improved its financial position and currently has over * subscribers, generating revenues of approximately $* million. The Partnership has also improved its operating cash flows. In its first five years of existence, the Partnership produced negative cash flows. In contrast, over the last five years, the Partnership has produced positive cash flows.

***6** Cincinnati Bell's reliance on PC Tower is misplaced. In PC Tower, the partnership owned certain rental real estate in Dallas, Texas. The Dallas real estate market had taken such a dramatic downturn that the partnership was unable to service its debt and had gone into default on its loans. The value of the partnership's real estate had dropped to a level below that of the debt. Thus, the partnership could only be run at a loss of $6 million per year. Importantly, because the Dallas real estate market was over-developed, the partnership had no reasonable prospect of redeveloping equity in the property. Notably also, the partnership agreement stated that the business purpose was for profit. Thus, the financial situation in PC Tower was extremely poor, and the prospects for future recovery were dim.

In contrast, in the present case, the undisputed record demonstrates that the Partnership is currently producing returns for its investors. Perhaps the Partnership's returns are not as great as its competitors, but it is meeting its stated purpose of providing cellular services. Moreover, Cincinnati Bell admits that the business is quite valuable, believing that they could receive a healthy return on their investment if the Partnership's business were sold. In effect, Cincinnati Bell urges the Court to compare the Partnership's ideal degree of financial success with the actual figures and use this as a basis for dissolving the Partnership. Such a comparison, while perhaps demonstrating disappointing past returns, is an inappropriate basis on which to order dissolution. Although Cincinnati Bell may be disappointed in its investment, it has not demonstrated that the cellular business can no longer be sustained. See Red Sail, Del.Ch., C.A. No. 12036, Allen, C. (Oct. 6, 1992) Mem.Op. at 10 (noting that a "blizzard of accounting complaints ... do not make the business of the firm impracticable...."). A report by Cincinnati Bell's own expert, Joseph N. Walter, shows that the Partnership's performance--measured by number of subscribers, growth in market share, revenues and EBITDA, and reduction in the churn rate--has improved steadily from 1992 through 1994. See The Walter Group Report, Appendix to Ameritech's Opening Brief, Vol. II at pp. R664, R703. The undisputed facts, therefore, fail to provide a basis upon which the Court could order dissolution of the Partnership.

In its second argument in support of its dissolution

request, Cincinnati Bell posits that another purpose of the Partnership is to provide cellular services as a complementary, rather than competitive, service to its limited partners' primary business--local exchange service. Cincinnati Bell notes that the parties did not anticipate the extent to which cellular services would compete with landline services when they entered the Partnership Agreement. The parties have found that consumers substitute cellular service for landline services. Thus, Cincinnati Bell finds itself in the position of funding its own competition.

***7** Moreover, Cincinnati Bell raises its concern over the Partnership's intention to provide bundled local and long distance cellular services. In Cincinnati Bell's view, the bundling allows the Partnership to compete directly with Cincinnati Bell's primary business, i.e., its wireline communications. Cincinnati Bell characterizes Ameritech's bundling of services as the general partner using the Partnership to advance its own competitive position against its limited partners' primary business. This competition, argues Cincinnati Bell, violates the Partnership Agreement, making it not reasonably practicable to carry on the Partnership.

Ameritech insists that the Partnership can, in conformity with the Partnership Agreement, compete with the limited partners' wireline services. Ameritech notes that the Partnership Agreement contains no prohibition or limitation on the Partnership's competing with wireline services. Thus, this competition may occur without violating the Partnership Agreement. Moreover, Ameritech notes that the parties were aware at the time of entering the agreement that wireless services could compete with wireline services. Instead of protecting itself in the Partnership Agreement, Cincinnati Bell executed the Partnership Agreement that does not contain a non-compete clause; nor did it ever seek an amendment to the Partnership Agreement.

Considering the standard for dissolution under § 17-802, I cannot accept Cincinnati Bell's argument. Indisputably, the Partnership Agreement does not limit the Partnership from competing with its limited partners. In fact, the Partnership Agreement contains a section which permits competition. It also provides that the partners may resell cellular services or equipment independently from the Partnership either in or outside of the Partnership's geographic area. The only limitation imposed by these sections is that the transactions must be on an arms-length basis. P.Agmt. §§ 8, 10. When the relationship between the parties is primarily contractual in nature, Delaware courts will not reform agreements to bestow additional rights on the parties for which they did not bargain unless it is clear that, had they negotiated on that matter, they would have agreed to that point. See generally Katz v. Oak Indus. Inc., Del.Ch., 508 A.2d 873 (1986) (considering the relationship between a corporation and its debt holders as contractual in nature). Here, it is not clear that the parties would have included a no compete provision in the agreement.

Competition between the Partnership and Cincinnati Bell is not a viable rationale for determining that the Partnership cannot be carried on in a "reasonably practicable" manner, consistent with the Partnership Agreement. [FN7] Notably, Cincinnati Bell is free to cash out its interest in the Partnership. Thus, it need not continue to fund competition against itself. Strangely, however, while it complains about funding its own competition, Cincinnati Bell continues to hold its Partnership interest. [FN8] Absent some limitation on competition against the Partnership in the Partnership Agreement (or some indication that had the parties considered it ex ante, they would have included such a provision in the Partnership Agreement), the fact that Cincinnati Bell is frightened of future competition is not a basis for unilaterally dissolving a viable business at the request of one limited partner.

FN7. This rationale for dissolution would also broaden the standard for dissolution expressed in 6 Del.C. § 17-802. As mentioned later in this Opinion, it is not appropriate to broaden the dissolution standard so as to expand the Court of Chancery's power beyond what the Legislature intended.

FN8. Notably, Cincinnati Bell and Ameritech entered discussions concerning a sale of Cincinnati Bell's interest in the Partnership to Ameritech in 1992. Ameritech offered a substantial amount of money for Cincinnati Bell's interest, an amount that even Cincinnati Bell's chief executive officer has characterized as a "good return all in all" considering the size of Cincinnati Bell's investment at the time. Because Cincinnati Bell's officers and directors viewed the Partnership as ultimately

> worth more than Ameritech's offer, they decided Cincinnati Bell should remain in the Partnership.

***8** Finally, Cincinnati Bell argues that Ameritech will compete with the Partnership itself by bundling services. Cincinnati Bell explains that ACI will place Ameritech in a conflict of interest situation because ACI will choose between selling wireline services or wireless services. If it chooses to sell wireline services, then Ameritech will receive 100% of the wholesale profit, whereas if it sells wireless service, AMCI will receive only 53% of the profit. Cincinnati Bell insists that this alleged competition is a breach of Ameritech's fiduciary duties and that the breach is a basis upon which to dissolve the Partnership.

Ameritech contends that Cincinnati Bell has no basis for asserting that Ameritech will provide cellular service within the Partnership area other than by reselling the Partnership's services. Section 7.1(a) of the Partnership Agreement expressly permits reselling of services and, further, authorizes Ameritech, as general partner, to cause the Partnership to enter into agreements for such services. Additionally, Ameritech argues that the profits will accrue to the Partnership itself and that providing long distance services is in the Partnership's best interest. Ameritech notes that it has not violated its duties to the Partnership at this point and that Cincinnati Bell's concerns are merely speculative. Ameritech also notes that Cincinnati Bell is free to enter into similar reselling arrangements.

Cincinnati Bell suggests that by reselling cellular services through ACI, ACI is competing with the Partnership's retail cellular service operations. Cincinnati Bell notes that the Partnership has 16 stores that sell cellular services, but these stores do not provide the "bundled" service. Thus, according to Cincinnati Bell, ACI is a subsidiary of AMCI that competes with one of the Partnership's lines of business. Even though Cincinnati Bell acknowledges that ACI is currently selling long distance services through the Partnership, it believes that Ameritech intends to offer long distance through ACI or another subsidiary.

Cincinnati Bell's argument here is flawed because its own concessions demonstrate that Ameritech currently does not compete with the Partnership. First, by recognizing that ACI is currently selling long distance services through the Partnership, Cincinnati Bell is conceding that Ameritech is not competing with the Partnership currently. Whether Ameritech will compete with the Partnership in the future is unknown. Second, the fact that Ameritech plans for the profits from the bundling to accrue to the Partnership also demonstrates that Ameritech is not competing with the Partnership. Cincinnati Bell is merely speculating that Ameritech will compete with Cincinnati Bell by offering long distance through ACI in the future. This conjectural rationale is not a basis on which the Court may dissolve the Partnership now, especially considering that the Partnership Agreement does not proscribe competition between partners. Moreover, even if such competition were occurring today, it is not a basis for dissolution because the Partnership Agreement is intentionally silent on the risks of competition between and among partners.

***9** As more fully explained later in this Opinion, Cincinnati Bell agreed to limit Ameritech's fiduciary duties as the general partner. In Section 16.1 of the Partnership Agreement, Cincinnati Bell agreed that Ameritech would not be liable to either Cincinnati Bell or the Partnership for any breaches (fiduciary or otherwise) unless the breach involved willful misconduct or gross negligence. Ameritech believes that bundling services does not violate the Partnership Agreement. This interpretation of the Partnership Agreement appears reasonable and, at the very least, reasonable minds may disagree as to whether the bundling of services is beneficial to the Partnership. Thus, one cannot conclude as a matter of law that by bundling services, Ameritech willfully or in a grossly negligent manner violated its duties of loyalty to the Partnership's business. Its duties to the limited partners only go so far as the business of the Partnership itself. See Davenport Group MG v. Strategic Investment Partners, Inc., Del.Ch., C.A. No. 14426, Steele, V.C. (Jan. 23, 1996), Mem.Op. at 15. In sum, because the exculpation provision in the Partnership Agreement encompasses the allegedly self-dealing plan to bundle services, this alleged breach is not a reason for the Court to dissolve the Partnership.

Cincinnati Bell has failed to point to specific facts on which this Court may determine that the business is no longer reasonably practicable to continue. Since Cincinnati Bell has the ultimate burden of

proof on its dissolution claim, and it has failed to show specific facts supporting this claim, Ameritech is entitled to summary judgment in its favor on the dissolution claim. Burkhart v. Davies, Del.Supr., 602 A.2d 56, 60 (1991).

B. Counts II and III: Ameritech's Duty to Sell the Partnership Assets

The parties agree that the Partnership's business purpose is "to fund, establish and provide" cellular mobile services within a geographic area bounded by Cincinnati, Dayton and Columbus, Ohio. The Partnership Agreement does not contain provisions authorizing the general partner or the limited partners to sell the Partnership assets as a going concern. Nevertheless, Cincinnati Bell seeks summary judgment on the claim, asserted in Counts II and III of its complaint, that Ameritech, as general partner, has a fiduciary duty to sell the Partnership's business and distribute the sale proceeds proportionately to the partners. This duty to sell the business, contends Cincinnati Bell, arises from two interconnected sources: (1) the general fiduciary duty that all general partners owe to their limited partners, Boxer v. Husky Oil Co., Del.Super., 429 A.2d 995, 997 (1981), and (2) the specific fiduciary duties of a trustee with respect to the assets of a trust, since trust law principles are applicable by analogy (argues Cincinnati Bell) to limited partnerships. Against the backdrop of these two legal frameworks, Cincinnati Bell then argues that Ameritech has a fiduciary duty to the limited partners to sell the Partnership's business because the business is worth more if sold than if it is managed by Ameritech. Cincinnati Bell believes the truth of this factual claim--that the partners' return on equity would be greater if the Partnership were liquidated immediately--is incontestably demonstrated by the record evidence.

***10** Cincinnati Bell first points to the Partnership's lackluster performance over its ten-year life. Next, Cincinnati Bell's experts testified that Ameritech's financial forecasts for future cash flow are implausible. In fact, Cincinnati Bell's experts suggest that the net present value of the Partnership, based on Cincinnati Bell's own forecasts, is negative. Finally, Cincinnati Bell's experts testified that the Partnership can be sold today to a strategic buyer (another telecommunications company) for $700 million to $850 million, making its sale value enormously greater than its operating value.

Ameritech responds to all of these arguments but it especially attacks the claims regarding the Partnership's past and predicted future financial performance. Assembling its own financial experts, Ameritech challenges the conclusions of Cincinnati Bell's experts and, without doubt, the "battle of the experts" in this case would consume much time and effort were this issue ever tried before the Court. But I find it unnecessary to enter into the fray over the Partnership's net present value as an operating business compared to its sale value to a third party. This debate, in my opinion, obscures the essential point: Under the Partnership Agreement Ameritech, as the general partner, has no authority to sell the Partnership's business. The Partnership Agreement specifically provides that the Partnership's purpose is to fund, establish and provide cellular services in the designated geographic area. The general partner is given broad powers in furtherance of this purpose--to market, sell and maintain cellular services in the limited geographic area for which the Partnership is licensed. In a fundamental sense, selling the Partnership's business would be contrary to the Partnership's stated purpose. A forced sale by judicial decree of dissolution would end the Partnership's ability to carry out its purpose of providing cellular services in the affected region.

Cincinnati Bell notes that the Partnership Agreement, in Section 4.1, grants Ameritech the power to sell the "cellular service system," as well as cellular services and, thus, such action is actually consistent with the Partnership Agreement's terms and conditions. See Kansas RSA 15 Limited Partnership v. SBMS RSA, Inc., Del.Ch., C.A. No. 13986, Allen, C. (March 8, 1995) (refusing to grant summary judgment where similar language was in issue). Nevertheless, I find this language consistent with the purpose of funding, establishing and providing cellular services in the particular geographic region. The general partners' power to market, sell, operate and maintain the cellular service system is necessary for carrying out the Partnership's business purpose-- promoting and providing cellular services to subscribers. Based on the terms of the Partnership Agreement, I conclude as a matter of law that Ameritech, as the general partner, has no authority to sell the Partnership's business.

***11** Nor do applicable provisions of Delaware's partnership statutes give Ameritech the right to sell the Partnership's business without the unanimous consent of all the partners. Under § 17-403(a) of the Revised Uniform Limited Partnership Act, a general partner of a limited partnership "has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners." 6 Del.C. § 17-403(a). A partner in a partnership without limited partners is governed by Delaware Uniform Partnership Law § 1509, which provides in pertinent part:

> (c) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all partners have no authority to:
>
> * * *
>
> (2) Dispose of the good will of the business;
> (3) Do any other act which would make it impossible to carry on the ordinary business of a partnership....

6 Del.C. § 1509(c) (emphasis added).

In the absence of language in a partnership agreement expressly empowering the general partner to sell the Partnership's business (as here), a general partner cannot sell the business without unanimous consent of all the partners. As a result, each partner, including Ameritech in this case, has a right under the applicable Partnership Law Statute (6 Del.C. § 1509) to withhold consent to a sale of the Partnership's business.

Cincinnati Bell dismisses the statute's unanimous consent restriction by saying the restriction cannot "supersede the unquestioned duty of a general partner to sell a business when necessary to meet [the general partner's] fiduciary obligations owed the limited partners." Cincinnati Bell urges the Court to order dissolution and sale of the Partnership because Ameritech has a fiduciary duty to sell it and refuses to do so.

In some respects I think Cincinnati Bell's argument for dissolution and sale implicitly broadens this Court's power to decree judicial dissolution of a limited partnership as defined under § 17-802 of the Revised Uniform Limited Partnership Act. The Court of Chancery's power to order dissolution and sale, in my opinion, is a narrow and limited power. See PC Tower, Del.Ch., C.A. No. 10788. The Court should not enlarge the dissolution power beyond the reach intended by the Legislature when it enacted § 17-802. Cf. Red Sail Easter Limited Partners, LP v. Radio City Music Hall Productions, Inc., Del.Ch., C.A. No. 12036, Allen, C. (Oct. 6, 1992) (applying PC Tower standard and § 17-802 standard and refusing to adopt broader dissolution principles from general partnership law).

Nevertheless, I have considered Cincinnati Bell's argument that general fiduciary duty principles, by analogy to corporation law or to trust law, require Ameritech to sell the Partnership to another competing telecommunications company. Fiduciary duties of care and loyalty require a sale in these circumstances, Cincinnati Bell argues, because (1) it's the prudent thing to do when an asset's operating value is less than its sale value; (2) the partners never expected that the Partnership's wireless phone business would compete directly against the partners' wireline phone business; and (3) Ameritech as general partner is competing, via the Partnership that it manages, against Cincinnati Bell's wireline business in the Cincinnati region. These developments--together with Cincinnati Bell's prediction that the level of competition threatened by the Partnership's business will increase dramatically in the future--have changed the partners' underlying business assumptions about the Partnership's business. With the Partnership poised to compete directly against the limited partners who fund it with significant capital contributions, Cincinnati Bell vigorously contends that Ameritech's refusal to sell is a violation of its fiduciary obligations to the other partners.

***12** Ameritech is quick to point out that the partners did foresee the competitive threat wireless services posed to wireline companies, that the Partnership Agreement itself does not proscribe competition between the Partnership and the constituent partners, that the Partnership actually enhances each partner's competitiveness by allowing partners to "resell" and "bundle" services such as wireless plus local or long distance with wireline services, and that Ameritech's own experts demonstrate that the Partnership is more valuable if operated rather than sold now.

All of the charges and counter-charges regarding this Partnership's lackluster past performance, and the highly conjectural claims over its sale value

today versus five years from now, are beside the point. Even accepting Cincinnati Bell's factual allegations about the Partnership's competition with the partners and its contention that the Partnership has a greater value if sold than if operated, Ameritech is entitled to summary judgment as a matter of law on the breach of fiduciary duty claims in Counts II and III. Corporation law is the source of most Delaware jurisprudence relating to the fiduciary duty of managers. Partnerships have much in common with the business corporation, not least of which is that the general partner exercises full managerial authority of the partnership similar to that exercised by a board of directors for a corporation. Thus, general fiduciary principles as applied in Delaware's corporation law decisions are applicable in the context of this limited partnership. Litman v. Prudential-Bache Properties, Del.Ch., 611 A.2d 12, 15 (1992).

A majority stockholder in a Delaware corporation owes no duty to sell its holdings in the corporation just because the sale would profit the minority. Bershad v. Curtiss-Wright Corp., Del.Supr., 535 A.2d 840, 844-845 (1987) (holding that a shareholder is under no duty to sell its holdings in corporation even if it is a majority shareholder, merely because the sale would profit the minority). Similarly, directors of the corporation have no obligation to approve a sale of the company's assets, even if such a sale would be advantageous, where the directors rightfully hold a veto of such a sale as shareholders. Thorpe v. CERBCO, Inc., Del.Supr., 676 A.2d 436, 437 (1996) (discussing Thorpe v. CERBCO, Inc., Del.Ch., C.A. No. 11713, Allen, C. (Oct. 29, 1993), Mem.Op. at 10-11, where Chancellor Allen held that a majority stockholder's ownership of its stock includes the property right to cast the controlling vote and to veto a sale of the business, even if a sale would be in the best interests of minority stockholders).

These same principals apply in the context of this limited Partnership. Ameritech owns 52% of the Partnership. Ameritech has property rights akin to those of a majority stockholder. Cincinnati Bell, with a 45% interest, is a passive minority investor with limited liability. Cincinnati Bell has no management authority. As with a minority stockholder, Cincinnati Bell has no right to demand that the majority owner sell all the business assets just because a sale would profit Cincinnati Bell.

***13** Like a majority stockholder in a corporation, Ameritech is the general partner and majority Partnership owner and is entitled to exercise its veto of a sale of the Partnership's business. Exercise of its property right in this fashion does not breach Ameritech's fiduciary duty to the minority interest partners. Ameritech's responsibility is to manage the Partnership in accordance with its purpose of establishing and providing cellular services in the Cincinnati, Columbus and Dayton region. Ameritech is under no fiduciary obligation to abandon that purpose and sell the business because one limited partner--Cincinnati Bell--believes it would be in its own strategic business interest to do so. All of the partners are entitled to resell Partnership wireless services, and to bundles services (offering wireless via the Partnership with local/long distance wireline) for its own customers, thereby offsetting potential losses in the wireline business with wireless services from the Partnership. This is the purpose of the Partnership, clearly expressed in the Partnership Agreement. If the partners want to sell the Partnership's business, all of the partners must consent to such a sale. Unless it is not reasonably practicable to carry on the business in conformity with its purpose or unless all the partners agreed to a dissolution of the business, Ameritech is under a duty to carry out the Partnership's purpose as expressed in the Partnership Agreement. If a partner does not share Ameritech's vision of the Partnership's viability in the cellular market, that partner retains the right under the Partnership Agreement to cash out its interest in the Partnership or to withdraw from the Partnership. In these circumstances, therefore, I conclude that as a matter of law Ameritech is entitled to summary judgment on Cincinnati Bell's claim in Counts II and III that Ameritech has breached its fiduciary duties of care and loyalty by refusing to sell the Partnership's business. [FN9]

FN9. I do not accept Cincinnati Bell's argument that trust law principles apply in this setting. A trustee's duty is to invest and conserve the trust assets for the benefit of the cestui que trust. A general partner's obligation, like that of a director, is to manage a specific business, a task that implies entrepreneurial risks. Because of the fundamental difference between the duties and functions of a trustee and a general partner in this case, I do not think trust law principles should, by analogy, be applied to Ameritech's duties as general partner of

the Partnership. Cf. Cinerama, Inc. v. Technicolor, Inc., Del.Ch., 663 A.2d 1134, 1148 (1994).

C. Counts II and III: Cincinnati Bell's Claims of Mismanagement and Gross Negligence

In Counts II and III of its amended and supplemental complaint, Cincinnati Bell alleges that Ameritech has breached the Partnership Agreement and has managed the Partnership in a grossly negligent manner. Cincinnati Bell has alleged numerous specific examples of Ameritech's gross mismanagement, but Cincinnati Bell insists that it is the "pattern" of conduct of Ameritech that constitutes gross mismanagement. For this pattern of mismanagement, Cincinnati Bell seeks money damages.

Before turning to the specific instances of alleged mismanagement (and the pattern of conduct of which they form constituent elements), it is useful to review the relevant terms of the Partnership Agreement concerning management and control of the Partnership. As mentioned earlier, § 1.3 of the Partnership Agreement notes the Partnership's purpose is to fund, establish and provide cellular services. In §§ 7.1 and 7.2, the Partnership Agreement sets out in broad terms the powers of a general partner:

> ***14** 7.1 Partnership Powers. In furtherance of the business purpose specified in Section 1.3, the Partnership, and the General Partner on behalf of the Partnership, shall be empowered to do or cause to be done any and all acts reasonably deemed by the General Partner to be necessary or appropriate in furtherance of the purposes of the Partnership or [similarly to] forebear from doing any act ... including without limitation, the power and authority:
>
> (a) To enter into, perform and carry out contracts and agreements of every kind necessary or incidental to the accomplishment of the Partnership's purposes, including, without limitation, contracts and agreements with the General Partner and Affiliates of the General Partner ...
>
> * * *
>
> (c) To carry on any other activities necessary to, in connection with or incidental to any of the foregoing.
>
> 7.2 Powers of the General Partner. In addition to those powers vested pursuant to Section 7.1, the General Partner hereby is vested with the power to:
>
> (a) Manage, supervise and conduct the affairs of the Partnership;
>
> (b) Make all elections, investigations, evaluations and decisions, binding the Partnership hereby, that may be necessary or appropriate in connection with the business purposes of the Partnership ...

Importantly, § 16.1 of the Partnership Agreement confers upon Ameritech, in exercising these managerial powers, broad contractual protection for conduct in its capacity as general partner:

> 16.1 Exculpation of the General Partner. The General Partner will not be liable for any loss to the Partnership or the Limited Partners by reason of any act or failure to act unless the General Partner was guilty of willful misconduct or gross negligence.

These provisions clearly demonstrate that the parties to the Partnership Agreement contracted to broadly empower the general partner to decide how to conduct the Partnership's business, including dealing with itself. In addition, the parties expressly limited the general partner's liabilities for loss by reason of any act or failure to act unless the general partner was guilty of willful misconduct or gross negligence.

Cincinnati Bell's complaint does not charge the general partner, AMCI, with willful misconduct. Instead, Cincinnati Bell characterizes AMCI's conduct over the years as gross negligence and gross mismanagement. Under Delaware law, therefore, it is Cincinnati Bell's burden to plead and to prove that AMCI was "recklessly uninformed" or acted "outside the bounds of reason." Tomczak v. Morton Thiokol, Inc., Del.Ch., C.A. No. 7861, Hartnett, V.C. (April 5, 1990), Mem.Op. at 31-32; Rabkin v. Philip A. Hunt Chemical Corp., Del.Ch., 547 A.2d 963, 970 (1986).

Ameritech argues that three acts of alleged gross negligence in particular are barred by the statute of limitations. I will consider these three events (hereinafter "the stale claims") at the outset, and treat the remaining nine examples of gross negligence (hereinafter "the pattern of mismanagement claims") later in this Opinion.

(1) The Stale Claims.

***15** Cincinnati Bell charges that AMCI raised prices for cellular services in order to compensate for declining revenues per customer. AMCI miscalculated the effect of the increase. The price increase resulted in customer defections and a loss of sales to new customers. AMCI eventually was forced to roll back the price increases. Ameritech disputes this claim, providing uncontradicted evidence that the price increase occurred in other AMCI managed partnerships, and not in the Ohio market. Importantly for this motion, however, is the undisputed fact that the increases occurred in 1989, over four years before this lawsuit was filed.

Next, Cincinnati Bell accuses AMCI of gross negligence or a breach of the Partnership Agreement when it caused the Partnership to acquire certain retail store operations in 1985 and 1989 and to operate them thereafter. Cincinnati Bell also complains that in 1992 AMCI changed its marketing strategy by offering to rent cellular telephones without first doing a study or analysis to determine the effect of such a change in strategy. Cincinnati Bell's own records, however, clearly show that the rental program began in 1990.

Cincinnati Bell instituted this action on February 23, 1994. All of the above incidents of alleged gross negligence or breach of the Partnership Agreement occurred before February 23, 1991, or more than three years before Cincinnati Bell filed the complaint. Delaware's three years statute of limitation applies to claims for breach of contract and to money damage claims for breach of fiduciary duty. 10 Del.C. § 8106; Bokat v. Getty Oil Co., Del.Supr., 262 A.2d 246, 250-51 (1970). Accordingly, unless the statute of limitations has been tolled in this case, Section 8106 bars these three specific claims of alleged gross negligence.

Not surprisingly, Cincinnati Bell offers five theories for why the statute of limitations should be tolled. Of course, where a plaintiff knows or should know of a supposed wrong, the statute of limitations is not tolled. See Kahn v. Seaboard Corp., Del.Ch., 625 A.2d 269, 277 (1993). Although Cincinnati Bell had contemporaneous knowledge, via its personnel monitoring the Partnership, of the incidents of which it now complains, it says it did not file the suit within the appropriate time because it relied on Ameritech's financial forecasts and was lulled into a false sense of complacency. Cincinnati Bell also characterizes AMCI's alleged wrongs as "continuing torts," for which the statute of limitations commences to run only when the tortious acts have ceased. See Van Heest v. McNeilab, Inc., 624 F.Supp. 891 (D.Del.1985). Next, Cincinnati Bell contends that its cause of action against Ameritech did not accrue until some undefined moment after February 23, 1991, when Ameritech's complete "portfolio" of negligent acts amounted, in combination, to gross negligence, thereby giving rise to an actionable claim. Citing Bovay v. H.M. Byllesby & Co., Del.Supr., 38 A.2d 808 (1944), Cincinnati Bell also insists that Ameritech's self-dealing equitably tolled the statute of limitations. Finally, Cincinnati Bell argues that the three year statute of limitations pursuant to Section 8106 is tolled until actual damages caused by the asserted wrongs have been found to exist.

***16** Based on the uncontroverted facts, Cincinnati Bell's claims of gross mismanagement arising from the 1989 price increase, the 1985 and 1989 acquisition of retail stores and the 1990 cellular phone rental program, all are barred by the three year limitations period established in Section 8106. None of the reasons offered by Cincinnati Bell for tolling the statute are persuasive. First, a statute of limitations begins running even though actual or substantial damages are inflicted at a later date. Kaufman v. C.L. McCabe & Sons, Inc., Del.Supr., 603 A.2d 831, 834 (1992); Isaacson, Stolper & Co. v. Artisan's Savings Bank, Del.Supr., 330 A.2d 130, 132 (1974). Second, equitable tolling occurs when the plaintiff can show it was ignorant of the wrong due to the defendant's fraud or fraudulent concealment or some other circumstance justifying why plaintiff did not have reason to know of the facts constituting the alleged wrong. Kahn v. Seaboard Corp., Del.Ch., 625 A.2d 269, 276 (1993). See In re Maxxam, Inc./Federated Development Shareholders Litig., Del.Ch., C.A. No. 12111, Jacobs, V.C. (June 21, 1995), Mem.Op. at 13-14; Patterson v. Hanby, Del.Ch., C.A. No. 6354 & 6062, Walsh, V.C. (April 24, 1985), Mem.Op. at 5-6. Cincinnati Bell cannot show that it was ignorant of the wrong because the undisputed facts show that it knew of the stale claims at the time, including the alleged self-dealing claim. Bovay v. H.M. Byllesby & Co., thus does not apply. Third, Cincinnati Bell's portfolio theory, combining all of Ameritech's alleged negligent acts

to make one later claim of gross negligence, is inapt here where the stale claims are actually separate claims involving discrete business decisions made by different persons. A combination of negligent acts by the same person may constitute gross negligence when the negligent acts can be viewed as cumulative with causative factors or inextricably related events leading to a particular incident or injury. In this case, the undisputed facts show that Cincinnati Bell's claims relate to the alleged negligence of separate persons, making independent business judgments, under distinct business conditions. These separable acts cannot be woven together as though they are part of an intertwined fabric constituting a monolithic course of conduct. Indeed, each incident cited by Cincinnati Bell is a free-standing event, a business judgment with its own distinct subject matter. Cincinnati Bell has taken separate business decisions involving different people separated by time and lumped them together as one actionable wrong. Cincinnati Bell's argument, however, is belied by the pleadings and by the record evidence. Accordingly, Cincinnati Bell's portfolio theory, and the continuing tort theory, are inapplicable. Finally, even Cincinnati Bell's complaint contradicts the claim that it delayed bringing this lawsuit because of its reliance on Ameritech's financial forecasts. The complaint alleges that Cincinnati Bell did not assert its dissolution claim earlier because of Ameritech's rosy forecasts regarding the Partnership's future profitability. No other particularized facts support Cincinnati Bell's argument that its reliance on Ameritech's financial forecasts caused it to delay filing a lawsuit concerning the stale mismanagement claims.

***17** The undisputed facts do not support Cincinnati Bell's contention that the statute of limitations should be tolled. Accordingly, because Cincinnati Bell knew or should have known of the stale claims at the time of the alleged grossly negligent actions, I find that the three stale claims are barred by the statute of limitations. 10 Del.C. § 8106.

I turn now to the nine remaining examples of alleged gross negligence and mismanagement. Because Cincinnati Bell insists that the examples should be viewed collectively, as a pattern of mismanagement, I will treat them collectively, rather than individually.

(2) Ameritech's Alleged Pattern of Mismanagement.

The complaint recites a litany of decisions by Ameritech that, in Cincinnati Bell's view, have had disastrous consequences for the Partnership. Cincinnati Bell portrays these decisions as either based on inadequate information, poor planning, self-interestedness, or disregard for the terms of the Partnership Agreement.

In early 1992, AMCI began implementation of the "D2000" initiative, which sought to reduce customer acquisition costs by cutting sales commission rates across the board. Unfortunately, D2000 had unfavorable results because competitors kept their commission rates high, thus causing the Partnership to lose many important channels of distribution to its competitors. The loss of distribution channels resulted in lower subscriber growth rates. Cincinnati Bell attacks AMCI for "inadequate investigation" of the D2000 initiative.

Cincinnati Bell also points to certain non-officer bonuses that AMCI paid in years when "revenue goals" were not achieved by the Partnership. Evidently, Ameritech rewards managers in the Ohio Partnership in whole or in part on the basis of AMCI's performance in managing all of Ameritech's Partnership ventures, not just on the basis of the Ohio Partnership's performance. In years when the Ohio Partnership performed poorly, therefore, AMCI still paid bonuses based on Ameritech's bonus "structure."

Cincinnati Bell next contends that since at least 1992 Ameritech should have made efforts to sell the Partnership, as a sale would have been instantly profitable to all the partners. This contrasts sharply, says Cincinnati Bell, with the ongoing dismal operating performance of the Partnership under AMCI. Furthermore, in light of the Partnership's allegedly poor performance, Cincinnati Bell contends Ameritech should turn over the Partnership's management authority from AMPS and AMCI to a "competent outside manager."

Yet another decision of which Cincinnati Bell complains occurred when Ameritech prematurely caused the Partnership to begin converting from analog to digital equipment, phasing out Series I cell site equipment and upgrading it to Series II equipment. This conversion cost the Partnership

about $* million in 1993, an expense that Cincinnati Bell contends the Partnership does not need to incur until 1997.

Cincinnati Bell also faults Ameritech for not having an adequate marketing plan for the Ohio Partnership. Cincinnati Bell's expert, Dr. Frederick Russ, a professor of marketing at the University of Cincinnati, testified that AMCI's Ohio market plans would not receive a passing grade in his marketing strategy class. To illustrate the deficiency, Professor Russ contends AMCI should adopt a plan that follows the general marketing plan framework suggested by Philip Kotler, an authority on marketing management. [FN10] Another instance of gross negligence, according to Cincinnati Bell, is AMCI's improper reimbursements for expenses and overhead from 1991-1994. AMCI staffs all Partnership activities and charges the Partnership with expenses and overhead. Cincinnati Bell notes that under Section 14.2 of the Partnership Agreement such expenses must be "incurred" by the general partner and that is AMPS, not AMCI. Thus, Cincinnati Bell contends these expenses and costs as allocated by AMCI were not allowed under the Partnership Agreement.

> FN10. Philip Kotler is a professor at the Kellogg Graduate School of Management, Northwestern University, and author of the most widely used marketing textbook in graduate schools of business. See Ameritech's Appendix, Vol. II at 549-577.

***18** Cincinnati Bell argues that Ameritech has been grossly negligent in failing to merge or "partner" with other wireless carriers in a national consortium as a response to the advent of PCS and the efforts of AT & T and GTE to create a national wireless business composed of both cellular and PCS licenses. Finally, Cincinnati Bell claims that Ameritech's forecasts of the Partnership's cash flow, profitability and capital needs demonstrated gross mismanagement, both because of the manner in which the forecasts were prepared and because ultimately the forecasts proved inaccurate.

The Partnership Agreement exculpates Ameritech from liability for loss to the Partnership or the limited partners for its acts or omissions unless the act or omission amounts to willful misconduct or gross negligence. Cincinnati Bell lists nine acts or omissions as examples of a pattern of gross negligence and mismanagement. Cincinnati Bell contends the evidence surrounding these acts or omissions is in dispute and, thus, summary judgment is inappropriate.

Most of the disputed evidence, however, centers around conflicting opinions by experts concerning the wisdom of a particular business strategy undertaken by AMCI on behalf of the Partnership (for example, the D2000 initiative; the switch from analog to digital equipment; the absence of a Kotler-type marketing plan; the failure to partner with other wireless carriers in a national consortium; the structure for awarding incentive bonuses). Ameritech counters each charge of mismanagement with an arsenal of statistics and expert opinion justifying the business decisions undertaken on behalf of the Partnership. None of this disputed evidence, however, is a basis for denying summary judgment because the material facts are in agreement--all of the questioned acts or decisions were business decisions undertaken in good faith by the managing partner to meet a strong competitor in the Ohio market (CCI), often on the advice of consultants and experts hired by the managing partner specifically for the purpose of making such decisions. Thus, in the D2000 initiative example, the uncontested facts reveal that Ameritech adopted it on the recommendation of qualified outside consultants and implemented the plan to the consultants' satisfaction. So even though Cincinnati Bell now points to opinions post hoc from its experts that the initiative was poorly conceived or implemented, it cannot show that Ameritech's conduct represents gross negligence. The evidence is and would be that Ameritech adopted D2000 after soliciting advice from recognized experts. As a matter of law, on those undisputed facts, I cannot conclude that Ameritech acted in a recklessly uninformed manner.

This same conclusion is inevitable with regard to the decisions not to join a national consortium of wireless carriers or to switch to digital equipment earlier rather than later in the Partnership's life. These are the sorts of business judgments typically made by a general partner. No evidence indicates that the general partner made these decisions without a review of the costs, advantages and disadvantages. In each instance, undisputed facts show that each suspect decision was the product of a cost benefit calculation commonplace in business entities

operating in a highly competitive market.

*19 Ameritech's failure to sell the Partnership's business and to hire a competent outside manager also do not fall outside the bounds of reason. As earlier noted, Ameritech is under no duty to sell its majority interest in the Partnership, even if to do so would benefit the minority. Nor is it legally required, as the majority interest holder and as the general managing partner, to turn management of the Partnership over to an outside party. If Ameritech were legally obligated to do so, it would find itself in the dubious position of having surrendered management to another while remaining fully liable as the general partner.

Even treating all nine discrete acts or omissions as one seamless web of general partner decisions, I cannot find from the uncontradicted facts that they fall outside the bounds of reason or that they were recklessly uninformed. See Tomczak v. Morton Thiokol, Inc., Del.Ch., C.A. No. 7861, Hartnett, V.C. (April 5, 1990). To the contrary, all of the acts, from forecasting cash flow and switching to digital equipment to foregoing a particular marketing plan and adopting the D2000 initiative--reflect decisions undertaken in good faith and based on informed judgments, even if particular decisions ultimately proved mistaken or less advantageous than originally conceived.

Cincinnati Bell's claim suggests Ameritech should function as a guarantor of the Partnership's performance. But the Partnership Agreement is silent as to the performance, profitability or even an expected time for the limited partners to receive a particular return on their investments. Considering the terms of the Partnership Agreement and the absence of any disputed facts concerning the basis for Ameritech's acts on behalf of the Partnership as its general partner, I find as a matter of law that Ameritech's conduct does not rise to the level of gross negligence or gross mismanagement. Accordingly, I grant defendants' motion for summary judgment as to the gross mismanagement and gross negligence claims of Counts II and III of plaintiff's amended and supplemental complaint.

* * *

Although the above conclusions make it unnecessary to consider further issues raised by the parties, it is noteworthy that Cincinnati Bell's claim for damages under Counts II and III appears unsupportable under Delaware law. In its amended complaint, Cincinnati Bell asks the Court to award "damages for the difference between the present value of [Cincinnati Bell's] limited partnership interest and the value such interest would have had but for [Ameritech's] gross mismanagement, negligence and breach of fiduciary duties." (Amended Complaint, ¶ 31, Prayer C). [FN11] Cincinnati Bell's claim for damages is clearly derivative in nature. Damages for the general partners' breach of fiduciary duties or for gross mismanagement would fall on the Partnership and all its partners. Litman v. Prudential-Bache Properties, Del.Ch., 611 A.2d 12, 15 (1992). Thus, I fail to see on what basis Cincinnati Bell can assert a claim for damages based upon what Cincinnati Bell's minority interest would be worth "but for" Ameritech's alleged gross mismanagement of the Partnership's business.

> FN11. It is also noteworthy that the parties have addressed the pending motions with reference to injunctive and declaratory relief being sought in connection with Counts II and III of the amended and supplemental complaint. Having carefully read the amended and supplemental complaint, I find no reference to injunctive or declaratory relief in either Count II or Count III, or the general prayers for relief.

*20 Additionally, Cincinnati Bell's damages claim appears predicated on assumptions about what the Partnership ought to be worth based on comparisons to industry averages. Cincinnati Bell's expert, for example, created a financial model for purposes of this case based on financial and operating ratios characteristic of the cellular industry. Extrapolating from that data, Cincinnati Bell's expert drew comparative conclusions about the Partnership's predicted cash distributions, data from which Cincinnati Bell ultimately derives the measure of damage to its minority interest.

Damages cannot be speculative or uncertain, Wise v. Western Union Telegraph Co., Del.Super., 181 A. 302, 305-06 (1935), but must be at least based on a "reasonable estimate." Thorpe v. CERBCO, Inc., Del.Ch., C.A. No. 11713, Allen, C. (Oct. 29, 1993), Mem.Op. at 10. Here, Cincinnati Bell's damage claims do not appear based on a reasonable estimate; rather, the damages are based on

assumptions about industry averages and are not linked specifically to the alleged acts of gross mismanagement or gross negligence. Accordingly, summary judgment is equally appropriate with respect to Cincinnati Bell's damages claim under Counts II and III.

IV. CONCLUSION

For the reasons set forth above, I grant summary judgment in favor of defendants and against plaintiff as to all counts of the amended and supplemental complaint. An Order has been entered in accordance with this decision.

ORDER

For the reasons set forth in this Court's Memorandum Opinion entered in this case on this date it is ORDERED:

1) that summary judgment is entered in favor of Defendants and against Plaintiff with respect to all claims in Counts I, II and III of the Amended and Supplemental Complaint; and

2) that the costs of this action are assessed to Plaintiff.

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